Supreme Court, U.S.
FILED

06-1190 FEB 27 2007

OFFICE OF THE CLERK

No. ____

In the Supreme Court of the United States

Amy G. and G. G.,
Petitioners,
v.
M. W.,
Respondent.

On Petition for a Writ of Certiorari to the California Court of Appeal Second District, Division Three

PETITION FOR A WRIT OF CERTIORARI

Leslie Ellen Shear
Counsel of Record,
Admitted 1988
16830 Ventura Blvd., Suite 347
Encino, CA 91436-1749
(818) 501-3691

Robert J. Friedman
9454 Wilshire Blvd., Suite 500
Beverly Hills, CA 90212-2908
(310) 273-2959

Counsel for Petitioner, G. G.

Diane M. Goodman
Goodman & Metz
17043 Ventura Blvd.
Encino, CA 91316-4128
(818) 386-2889

Counsel for Petitioner, Amy G.

QUESTION PRESENTED

Petitioners, a husband and wife raising the husband's extramarital child, seek legal recognition of the wife as the child's mother. In refusing to extend presumed-father laws to a maternity contest between the wife and the birth mother, the California court of appeal relied on *Tuan Anh Nguyen v. I.N.S.*, 533 U.S. 53, 54 (U.S., 2001) to find no equal-protection violation. California's Supreme Court denied review.

California's substantive parentage presumptions (the presumed-father statutes, Cal. Fam. Code §§7540, 7541, 7611 and 7612) are driven, not by biological paternity, but by the state's interest in the welfare of the child and the integrity of the family. *Elisa B. v. Superior Court*, 37 Cal.4th 108 (Cal., 2005). This Court upheld application of California's presumed-father laws over the liberty-interest claims of a biological father and daughter in *Michael H. v. Gerald D.*, 491 U.S. 110 (U.S., 1989).

Under what, if any, circumstances do the U.S. Constitution's Fourteenth Amendment due-process, equal-protection, and privacy guarantees permit different treatment of men and women in parentage and child custody cases? This question includes three narrower subsidiary questions:

1. Do Fourteenth Amendment equal-protection, due-process and privacy guarantees require a state to apply its presumed-father statutes to maternity cases?
2. Do Fourteenth Amendment equal-protection, due-process and privacy guarantees require a state to give the same protection to marital families raising a husband's extramarital child, that it gives marital families raising a wife's extramarital child?
3. Do Fourteenth Amendment equal-protection, due-process and privacy guarantees require a state to give a husband's extramarital child, and a wife's extramarital child the same marital-family protections?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

TABLE OF CONTENTS

Opinions Below 1

Jurisdiction 1

Constitutional and Statutory Provisions Involved 1

Statement of the Case 1

Reasons for Granting the Petition 4

A. *Permissible Role of Gender in State Parentage Establishment Law: This case provides an opportunity for this Court to articulate the standards governing gender-based equal-protection, due-process, and family-privacy claims in cases where the law decides who it will recognize as a parent for purposes of deciding who will raise and support the child.* 6

B. *Protection of the Marital Family: This case provides an opportunity for this Court to articulate the standards governing gender-based equal-protection, due-process, and family-privacy claims in cases where the law decides which marriages are entitled to state protection, and which children and marital families are to be protected from the social stigma of illegitimacy.* 11

C. *"Pregnancy Presumption" Is use of a conclusive "pregnancy presumption" instead of individualized weighing of attachments arising from nature and nurture sufficiently narrowly-tailored to serve the state's objectives and survive equal-protection scrutiny?* 13

D. *Fit Between Gender-Neutral Custody and Support Law and Gender-Based Parentage Scheme. Can a state that proclaims gender irrelevant to the exercise of the rights and responsibilities of parenthood, rely on gender-based generalities when regulating who gets those rights?* 18

E. *Conclusion: This case provides an opportunity for this Court to clearly articulate a more unified view of the constitutional parameters governing state resort to gender-based classifications in parentage and custody matters..* 19

INDEX TO APPENDICES

Appendix A Decision of California Court of Appeals 1a

Appendix B Decisions of Superior Court of California 1b

Appendix C Decision of California Supreme Court . 1c

Appendix D California Statutes 1d

TABLE OF AUTHORITIES

United States Constitution

Amendment XIV ..... *passim*

California Statutes

Family Code §297.5(d) 11

Family Code §3010 18

Family Code §3040 18

Family Code §3500 et seq. 19

Family Code §7540 ..... 3, 5, 8

Family Code §7541 ..... 3, 8

Family Code §7611 ..... 3, 4, 5, 8, 16

Family Code §7612 3

Family Code §7635(b) 3

Family Code §7650 ..... 3, 16

Federal Cases

Caban v. Mohammed, 441 U.S. 380 (U.S.1979) 7, 8, 15

Gomez v. Perez, 409 U.S. 53 (U.S. 1973) 13

Lehr v. Robertson, 463 U.S. 248, 261 (U.S. 1983) ... 15

Levy v. Louisiana, 391 U.S. 6 (1968) 13

Michael H. v. Gerald D., 491 U.S. 110 (U.S. 1989) 3, 4, 12

Miller v. Albright 523 U.S. 420 (U.S.1998) 9

Tuan Anh Nguyen v. I.N.S., 533 U.S. 53 (U.S. 2001) 4, 6, 7

Troxel v. Granville, 530 U.S. 57 (U.S. 2000) 4, 10, 17, 18, 20

U.S. v. Virginia, 518 U.S. 515, 531 (U.S. 1996) 6

Weber v. Aetna Casualty & Surety Company, 406 U.S. 16 (U.S. 1972) 13

State Cases

Amy G. v. M.W., 142 Cal.App.4th (Cal.App., 2006) ..... *passim*

Craig L. v. Sandy S., 125 Cal.App.4th 36 (Cal. 2004) 3

Dawn D. v. Super. Ct. (Jerry K.) 17 Cal.4th 932 (Cal. 1998) 5

Elisa B. v. Superior Court, 37 Cal.4th 108 (Cal. 2005) 5, 20

In re Jesusa V., 32 Cal.4th 588 (Cal. 2004). 3, 5, 8

Johnson v. Calvert, 5 Cal.4th 8 (Cal. 1993) 19

In re Karen C., 101 Cal.App.4th 932 (Cal. 2002) 8, 17, 19

K.M. v. E.G., 37 Cal.4th 130 (Cal. 2005) 19

Kristine H. v. Lisa R., 37 Cal.4th 156 (Cal. 2005) ... 19

Lisa I. v. Super. Ct. (Phillip V.), 133 Cal.App.4th 605 (Cal. 2005) ... 3

Adoption of Matthew B., 232 Cal.App.3d 1239 (Cal. 1991) ... 19

Marriage of Moschetta, 25 Cal.App.4th 121 (Cal.1994) ... 19

In re Nicholas H. 28 Cal.4th 56 (Cal. 2002) ... 5, 16

Prato-Morrison v. Doe, 103 Cal.App.4th 222 (Cal. 2002) ... 19

Robert B. v. Susan B., 109 Cal.App.4th 110 (Cal. 2003) ... 19

In re Salvador M., 111 Cal.App.4th 135 (Cal. 2003) ... 19

Vincent B. v. Joan R., 126 Cal.App.3d 619 (Cal. 1981) ... 12

PETITION FOR A WRIT OF CERTIORARI

OPINION BELOW

The opinion of the California Court of Appeals, Second District, Division Three is reported at 142 Cal.App.4th 1.

JURISDICTION

The opinion of the court of appeals was entered August 17, 2006. The California Supreme Court denied a timely Petition for Review on November 29, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The equal-protection clause of the Fourteenth Amendment to the Constitution provides in relevant part "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The relevant provisions of the California Family Code are reproduced at App. D, *infra,* at page *1d.*

STATEMENT OF THE CASE[1]

Amy G. and G.G. are a married couple, raising G.G.'s extramarital child, Nathan, as a child of their marriage with their two older children. When Nathan was six months old,

---

[1] Except where noted by record citations, this factual summary tracks the Court of Appeals account of the facts.

Kim (M.W.), his birth mother, sought emergency orders for child custody and child support in a parentage action. [Ex.109-127]

At the time of Nathan's conception and birth, Kim was married, but separated from her husband. When she became pregnant, Kim left California for Virginia, where she remained to conceal her pregnancy and her biological relationship to the baby from all of her family, friends, fellow church members and business associates. [Ex. 16-17, 18, 49, 114, 154, 185, 206, 1081]

> The parties disagree as to their intent and as to the circumstances of Nathan's conception and birth. Father asserts Kim offered to bear a child who would be raised as a child of his marriage to Amy. Kim contends her relationship with father was romantic, the pregnancy was unplanned, and that she expected they would raise Nathan jointly.
>
> *Amy G. v. M.W.*, 142 Cal.App.4th 1, 5 (Cal.App., 2006)

When Nathan was 29-days-old, Kim delivered him to his father; together with all of his clothing, birth and hospital records, and personal effects. [Ex. 60, 147,155,1082] Without counsel, she signed a agreement drafted by a Virginia lawyer retained by G.G., consenting to a stepparent adoption by Amy. She contends she did not understand what she was signing and felt pressured to do so. The agreement did not comply with California law governing stepparent adoptions. Amy and G.G. did not initiate a stepparent adoption before Kim brought her parentage action.

The family court ordered a child custody evaluation, and limited Kim to monitored visitation with Nathan, based on evidence of her inability to care for him safely. The child custody evaluator found that Amy is Nathan's psychological mother, and recommended that any visits between Nathan and Kim be monitored for Nathan's safety, and for abduction prevention. [Ex. 1-101, 110, 1185]

The family court dismissed Amy's separate maternity action for lack of standing, and denied G.G.'s motion to join Amy as a party to the action. Amy and G.G. contended that they were entitled to plead and prove that Amy should be recognized as Nathan's mother under California's presumed-father laws (Fam. Code §§ 7540-41, 7611-12, 7635(b) and 7650).

California's presumed-father laws have been substantially amended and more-extensively interpreted since this Court considered them in *Michael H. v. Gerald D.*, 491 U.S. 110 (U.S. 1989).

Under California law, if Amy was a husband, rather than a wife, she would be a presumed parent. If the trial court concluded that Kim's 29 days of caring for Nathan in hiding constituted receiving him into her home and holding him out as her natural child under Cal. Fam. Code §7611(d), Kim would also have presumed-mother status and standing. See *Lisa I. v. Super. Ct. (Phillip V.),* 133 Cal.App.4th 605 (Cal. 2005).

If Kim had standing, then the family court would have balanced the competing women's claims under the "best interests" standards set forth by the California Supreme Court in *In re Jesusa V.*, 32 Cal.4th 588 (Cal. 2004). See also *Craig L. v. Sandy S.,* 125 Cal.App.4th 36 (Cal. 2004), holding, *inter alia*, that Fam. Code §7541's genetic testing provision doesn't make biology dispositive of parenthood where biological parent has §7611(d) standing and acts in a timely fashion, because the husband gets 'a second bite at the apple' under Fam. Code §§7611-12.

Amy and Kim also wanted to plead and prove that Kim is estopped from contesting Amy's legal status as Nathan's mother.

Amy and G.G. sought appellate review by writ and appeal. California's court of appeal stayed the trial court proceedings, and consolidated the writ and appeal.

The court of appeal refused to apply the presumed-father laws to Amy. The opinion characterizes California

law as applying the presumed-father laws to women only in limited situations,

> In limited circumstances, the presumptions of paternity listed in section 7611 have been interpreted to apply to women. [Citations]
>
> *Amy G. v. M.W.*, supra, 142 Cal.App.4th12

The court of appeals held that gender-neutral application of the presumed-father statutes is not "practicable" here because of the biological differences between men and women.

The court cited this Court's decision in *Tuan Anh Nguyen v. I.N.S.*, 533 U.S. 53, 54 (U.S. 2001) in support of its holding that federal constitutional equal-protection guarantees were not violated because Amy is not similarly-situated to a lesbian mother, nor to a husband.

Petitioners' timely petition for review by the California Supreme Court was denied on November 29, 2006. The California Supreme Court did not depublish the court of appeal opinion.

REASONS FOR GRANTING THE PETITION

California's court of appeals has decided an important question of law in a way that conflicts with this Court's holdings in *Tuan Anh Nguyen v. I.N.S.*, supra, 533 U.S. 53, 54; *Michael H. v. Gerald D.*, supra, 491 U.S. 110; and *Troxel v. Granville*, 530 U.S. 57 (U.S. 2000).

The California decision conflicts with *Nguyen* because it fails to consider the purposes of the statutory scheme when determining which groups of putative parents are similarly-situated. It conflicts with *Michael H.* because it fails to give any weight to protection of the marital family. It conflicts with *Troxel* because it fails to recognize the heightened standard governing parental-rights cases, and the importance of minimal state interference into family life.

This case is important for the same reasons that those cases have continued importance, and are regularly relied-

upon by state courts and legislatures. *Amy G.* provides an opportunity for this Court to harmonize those cases and address the standard governing the "fit" between gender classification and the purposes of a state's statutory scheme in family law cases determining who possesses fundamentally protected rights. State courts need that guidance from this Court.

Who is a parent? What is a family? What marital and family units are entitled to state protection? May state law use gender to answer those questions?

When state law answers those questions, the most fundamental personal relationships and liberty interests are at stake. Must states use a higher standard of care when using gender-based distinctions in those cases?

In California, those questions are often answered by applying the presumed-father statutes, a set of substantive laws which further the state's interests in marital integrity and privacy, stable family ties during childhood, and protection of children from the stigma of illegitimacy. *In re Jesusa V.*, supra, 32 Cal.4th 588.

Under the presumed-father statutes, biological parenthood is either relevant but not determinative (Ibid.) or entirely irrelevant (*Dawn D. v. Super. Ct. (Jerry K.)* 17 Cal.4th 932 (Cal. 1998), U.S. cert. denied 525 U.S. 1055; *Elisa B. v. Superior Court*, 37 Cal.4th 108 (Cal. 2005)).

A man who is married to a child's mother (Cal. Fam. Code §7540, §7611(a)), or who receives a child into his home and holds the child out as his natural child (Fam. Code §7611(d)) attains presumed-father status under California law. "Natural" does not mean "biological" under the parentage sections of the Family Code. One may hold a child out as one's natural child under §7611(d) without claiming a biological tie to the child. *Elisa B. v. Super. Ct. (Emily B.)*,

supra, 37 Cal.4th 120; *In re Nicholas H.* 28 Cal.4th 56 (Cal. 2002).[2]

"Parties who seek to defend gender-based government action must demonstrate an "exceedingly persuasive justification" for that action." *U.S. v. Virginia,* 518 U.S. 515, 531 (U.S. 1996). How persuasive must that justification be when a state adopts different gender-based standards for decisions about who holds and exercises the fundamental liberty interest of parenthood? Must the justification be substantially-related to each of the state and constitutionally-protected individual interests?

A. *Permissible Role of Gender in State Parentage Establishment Law:*

This case provides an opportunity for this Court to articulate the standards governing gender-based equal-protection, due-process, and family-privacy claims in cases where the law decides who it will recognize as a parent for purposes of deciding who will raise and support the child.

The California court misread, misconstrued and misapplied *Tuan Anh Nguyen v. I.N.S.*, supra, 533 U.S. 53, 54. California failed to test the trait (gestational bonding) that it used to distinguish between classes of putative parents based on gender against the long-established purposes of California's presumed-father statutes (marital integrity and privacy, stable family ties during childhood, and protection of children from the stigma of illegitimacy).

Nguyen holds that for a gender-based classification to withstand equal-protection scrutiny, it must be established at least that the challenged classification serves important

---

[2] But the *Amy G.* court held that "natural" *does* mean "biological" in cases involving the competing claims of a child's birth mother, and a woman who receives the child into her home and raises him as her own, even though it has a different meaning in other fact-patterns. *Amy G. v. M.W.*, supra, 142 Cal.App.4th 15.

governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives (Id. 60-61).

In *Nguyen* the purpose of the federal immigration statute was to determine the existence of a biological tie between a person claiming citizenship and a U.S. citizen that would give rise to a real-world opportunity to form a relationship with the child. Hence the biological differences between men and women with respect to their knowledge that the child had been born provided substantial basis for treating men and women differently.

The interests at stake in *Nguyen* were not the fundamental liberty-interests of parents and children to protection and continuity in their family relationships, nor the fundamental liberty-interests of marital families in marital integrity and privacy. Congress was unconcerned with an individual child's best interests. In *Nguyen*, the interest at stake was Congressional power to regulate immigration and naturalization. The "child" was an adult felon attempting to avoid deportation by asserting U.S. citizenship, not a minor child whose upbringing turned on who established parentage.

In *Caban v. Mohammed*, 441 U.S. 380, 389 (U.S.1979), this Court voided on equal-protection grounds a law New York claimed was justified by the "gestational bonding" rationale used decades later in *Amy G.* "Even if unwed mothers as a class were closer than unwed fathers to their newborn infants," this Court held, "this generalization concerning parent-child relations would become less acceptable as a basis for legislative distinctions as the age of the child increased." Id. at 389. What weight does that precedent have today?

New York adoption law simply could not presume that women have a meaningful relationship with their offspring but men do not. This Court rejected the claim that the New York statute's broad, gender-based distinction was required by any universal difference between maternal and paternal

relations at every phase of a child's development. This Court held that the statutory, inflexible gender-based classification was not fair and reasonable, and did not rest upon some ground of difference having a fair and substantial relation to the object of the legislation. Id at 391.

Do the principles of *Caban*, rejecting inflexible gender-based distinctions for the termination of parental rights, carry over to cases establishing whether men and women possess parental status?

California's Supreme Court has held that the state's presumed-father statutes embody a position of biological relevance: biology is not the whole story or even the most important part of the story. *In re Jesusa V.*, supra, 32 Cal.4th 616 (Cal. 2002).

In re Karen C., 101 Cal.App.4th 932, 936 (Cal. 2002), applying the presumed-father statutes to a maternity case, summarizes the policies that numerous California appellate decisions have articulated, "The judicial determination of paternity is thus a mixture of a search for genetic truth and the implementation of the strong public policies favoring marriage and family stability, and disfavoring labels of illegitimacy. A judgment establishing paternity can, therefore, be a decretal fiction."

Under the presumed-father statutes, courts make individualized determinations of the child's best interests on a case-by-case basis under Cal. Fam. Code §7612 to determine whether biological parenthood should rebut presumed fatherhood, and which of two presumed fathers will be recognized in law as the child's parent. *In re Jesusa V.*, supra, 32 Cal.4th 588, 604-609, 615; *Craig L. v. Sandy S.*, supra, 125 Cal.App.4th 36 (even where biological parent with standing rebuts §7540 presumption under §7541 through genetic testing, husband and wife may resort to the §§7611-12 presumptions, and court must engage in individualized balancing).

Members of this Court have articulated somewhat different standards for the heightened equal-protection

scrutiny required to test the validity of state action that treats mothers and fathers as different classes. But they have generally agreed that there must be a strong relationship between the purposes of the statute, and the trait that distinguishes men from women.

Even where sex-based stereotypes underlying legislation may hold true for many, even most, individuals, this Court consistently rejects official actions that classify unnecessarily and overbroadly by gender when more accurate and impartial functional lines can be drawn. *Miller v. Albright* 523 U.S. 420 (U.S.1998).

Where the interests involved are those that this Court has traditionally recognized as fundamental, does there need to be a closer "fit" between the sex-based traits defining the classes, and the purposes of the statutory scheme?

In *Amy G. v. M.W.*, supra, 142 Cal.App.4th 1, a state appellate court has carved out an irrebuttable "pregnancy presumption" governing maternity cases that substitutes for individualized fact-finding and balancing when two women compete for mutually-exclusive status as mothers. California uses individualized determinations to resolve disputes between presumed fathers.

The California Court held that Amy G. is not similarly situated to non-biological presumed fathers (men who have married the mother or received the child into their homes as their natural child) or to non-biological lesbian mothers, simply because she is competing against a birth mother.

In the court of appeal's eyes, gestational bonding always trumps not only bonds created through daily nurture, but also trumps the state's interests in the permanence and stability of children's developmentally significant bonds, marital privacy and integrity, and avoiding the social stigma of illegitimacy.

While pregnancy undoubtedly gives birth mothers an initial opportunity to develop a relationship to the child that promotes the growth of stable, developmentally-strong bonds with the child, the facts of *Amy G.* show that is not

always the case, and the existence of those bonds between the child and one of the putative parents does not fully satisfy the purposes of the statutory scheme.

The irrebuttable pregnancy presumption bars courts hearing maternity cases from considering whether gestational bonding led to a meaningful mother-child relationship, whether the child has a stronger mother-child relationship with the woman married to the father, the impact of recognition of the birth mother on marital integrity and privacy, the impact of the stigma on the child, and the child's best interests.

May California conclude that it is enough that many or even most birth mothers would prevail under those factors? Application of the pregnancy presumption requires conferring legal status on birth mothers who have abandoned their children, as well as those who have raised them.

This case presents the constitutional issues squarely, without messy, contested facts. Appellate review arose from rulings on pretrial motions based upon stipulated facts. [Ex. 110, 1185] The rulings on joinder and the motion to quash Amy's action excluded Amy from the litigation. No trial has taken place.

In *Troxel*, this Court held that the right to raise one's children is among the most fundamental liberty interests a person can possess. It follows that when state law governs who holds that liberty interest, it must do so in a fashion that meaningfully honors the Constitution's due-process, equal-protection, and family-privacy guarantees.

B. *Protection of the Marital Family:*

This case provides an opportunity for this Court to articulate the standards governing gender-based equal-protection, due-process, and family-privacy claims in cases where the law decides which marriages are entitled to state protection, and which children and marital families are to be protected from the social stigma of illegitimacy.

May states treat men and women differently under parentage statutes driven, not by biological paternity, but by the state's interest in the welfare of the child and the integrity of the family?

In answering that question, this Court can clarity the standards that govern gender-based due-process, equal-protection, and family-privacy claims in a broad range family law cases where the law decides who will raise a child.

In a sense, this is a true "defense of marriage" case, although the term has been popularized for other purposes. This case is really about defending marriage[3] – one of the long-recognized purposes of the governing statutes is to protect marital families, and the child's right to the protection of the marital family.

California applies the presumed-father statutes to cases in which married couples are raising the wife's extramarital child, and to same-sex motherhood cases. But California discriminates against married couples raising the husband's extramarital child, denying them, and their children, the same protections.

Does the Constitution permit California to protect some marriages, but not others, depending solely on the gender of the parent who had an extramarital child?

---

[3] California law gives domestic partnerships and the children of domestic partners the same protections with respect to parentage, including application of the presumed-father laws, that it gives to marital families. Cal. Fam. Code §297.5(d).

In celebrating the primacy of gestational bonding, the California court failed to extend the same weight that it affords to a wife's marital family to the father's marital family – thereby denying the child the protection of the marital family.

California's presumed-father statutes embody a long-established, strong public policy in favor of the protection of marital families.

> The conclusive presumption is actually a substantive rule of law based upon a determination by the Legislature as a matter of overriding social policy, that given a certain relationship between the husband and wife, the husband is to be held responsible for the child, and that the integrity of the family unit should not be impugned. [Citations] In addition, the rule protects the innocent child from the social stigma of illegitimacy. [Citations] Although the Uniform Parentage Act, adopted in California in 1975 (Civ. Code, § 7000 et seq.), attempts to remove the legal effects of illegitimacy, the Legislature nevertheless retained the conclusive presumption of Evidence Code section 621, in contrast to the other presumptions under the act, which are rebuttable. [Citations]
>
> *Vincent B. v. Joan R.*, 126 Cal.App.3d 619, 623 (Cal. 1981)

This Court observed in *Michael H. v. Gerald D.*, supra, 491 U.S. 110, 120, that the "presumption not only expresses the State's substantive policy but also furthers it, excluding inquiries into the child's paternity that would be destructive of family integrity and privacy."

The *Amy G.* decision fails to factor family integrity and privacy into the equation, when it refuses to extend the marital presumptions to women. Unlike Victoria (the child in *Michael H.* who spent substantial time living in a non-marital family unit with her mother and biological father), Nathan has not spent a significant period of time living with

Kim in a family setting. This case does not involve competition between a traditional and a nontraditional family form.

Similarly, the *Amy G.* court failed to consider the policy of protecting children from the stigma of illegitimacy. Nathan is approaching school age. Because Nathan has two older siblings, and his parents have been married for many years, Nathan will inevitably suffer from this stigma – as will his parents and siblings. If Kim starts turning up at church and school events as Nathan's mother, Nathan's community will be well-aware of his status as a child conceived outside of his parents' marriage.

Do children like Nathan have an equal-protection right to the same protections of the marital family that California gives a wife's extramarital child, or can the state pick and choose based upon generalities about gestational bonding?

In a series of landmark cases that inspired development of the first Uniform Parentage Act and the abolition of bastardy law, this Court acted to protect children's equal-protection rights with respect to parentage. *Levy v. Louisiana*, 391 U.S. 6 (1968); *Weber v. Aetna Casualty & Surety Company*, 406 U.S. 16 (U.S. 1972); *Gomez v. Perez,* 409 U.S. 53 (U.S. 1973). Does California's birth-mother exception to the presumed-father laws similarly violate children's equal-protection rights?

C. *"Pregnancy Presumption" Is use of a conclusive "pregnancy presumption" instead of individualized weighing of attachments arising from nature and nurture sufficiently narrowly-tailored to serve the state's objectives and survive equal-protection scrutiny?*

In effect, California has adopted an uncodified, irrebuttable "pregnancy presumption" as a substantive rule of law, governing parentage disputes involving birth mothers. This Court should consider whether that presumption is sufficiently narrowly-tailored to California's articulated objec-

tives for its parentage statutes to meet heightened substantive due-process and equal-protection standards.

Under the California decision, the appellate court's gender-based generalities about the psychological bonds women form during pregnancy bar case-by-case consideration of real-world relationships in maternity cases. Yet the quality of an individual putative father's real-world parental and marital relationships often outweigh biology in paternity cases.

In other words, the California decision judicially creates an irrebuttable-presumption that nature is stronger than nurture for all putative mothers. The same statutes, applied to paternity cases, require individualized evidence and assessment of each putative father's relationships with the child, the mother and the child's siblings.

Such broad, gender-based generalities just don't match up with our daily lives and experiences. Many, if not most, husbands form deep attachments to expected children during their wives' pregnancies, even when they know (as in cases of artificial insemination) that they are not biologically-related to the baby. News reports are full of stories about women with post-partum depression who fail to bond with their newborns, and women who abandon newborns – or worse. While gestation can be a powerful source of commitment and connectedness, life experience and daily headlines teach us all that it is far from a sure thing.

This case itself powerfully illustrates the fallacy of the gender-based generality that pregnancy is more likely to serve the state's goals than nurture. After nine months of pregnancy, and 29 days of caregiving, Kim turned Nathan over to his father. It took her five months to bring her 'emergency' custody request. The Court's evaluator found that Nathan has a deep and important mother-son bond with Amy, and weaker ties to Kim. He also found that Kim's parental judgment is so poor that she cannot be alone with Nathan. [Ex. 190-192] Because the trial judge felt con-

strained by the law not to apply the presumed-father laws, he could not consider the impact of his decision on Nathan, or the realities of Nathan's relationships and bonds.

This Court should decide whether a state may conclusively presume that a birth mother's gestational bonding always outweighs the emotional attachments that derive from the intimacy of daily association, that this Court has recognized in unwed-father cases,

> The difference between the developed parent-child relationship that was implicated in *Stanley* and *Caban*, and the potential relationship involved in *Quilloin* and this case, is both clear and significant. When an unwed father demonstrates a full commitment to the responsibilities of parenthood by "com[ing] forward to participate in the rearing of his child," *Caban*, 441 U.S., at 392, 99 S.Ct., at 1768, his interest in personal contact with his child acquires substantial protection under the due process clause. At that point it may be said that he "act[s] as a father toward his children." [Citation] But the mere existence of a biological link does not merit equivalent constitutional protection. The actions of judges neither create nor sever genetic bonds. "[T]he importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in 'promot[ing] a way of life' through the instruction of children as well as from the fact of blood relationship." [Citations]
>
> *Lehr v. Robertson*, 463 U.S. 248, 261 (U.S. 1983)

California courts have emphasized that a central purpose of the statutory scheme is to protect the child's stable, permanent family ties. In a recent case, a California appellate court reiterated that policy, when applying the

presumed-father laws to a single woman raising a biologically-unrelated child,

> The judicial determination of paternity is thus a mixture of a search for genetic truth and the implementation of the strong public policies favoring marriage and family stability, and disfavoring labels of illegitimacy. A judgment establishing paternity can, therefore, be a decretal fiction.
>
> The effect of the section 7611 presumptions of paternity is that in certain cases, a man known not to be the child's genetic father is decreed to be the de jure father. [FN] Any doubt about this premise was dispelled by the decision in *Nicholas H.*, supra, 28 Cal. 4th 56. There, the man seeking to establish paternity conceded that he was not the genetic father. He did not meet the child's mother until three months before the child was born, but received the child into his home and openly raised Nicholas as his natural child. [FN] ... Our Supreme Court reversed the appellate court, holding that clear and convincing evidence of nonpaternity does not always overcome the presumption of paternity; rather, it overcomes it only "in an appropriate action." (*Nicholas H.*, at pp. 59, 63, 70.) The quoted phrase appears in the statute, and the phrase has no meaning unless it can mean that in a case where it is "inappropriate" to deny a judgment decreeing the paternity of a man known not to be the father, the presumption is unrebutted, and the decree should issue. (Id. at p. 70.)
>
> Further, one of the key holdings of *Nicholas H.* is "that a man does not lose his status as a presumed father by admitting he is not the biological father." (*Nicholas H.*, supra, 28 Cal. 4th at p. 63.)
>
> The foregoing principles should apply equally to women. (*Johnson v. Calvert* (1993) 5 Cal. 4th 84, 89; §7650.) It then follows that here, where no one

> nominated the birth mother as a candidate for a declaration of maternity, the fact that Leticia was assumed not to be the birth mother "by clear and convincing evidence" consisting of her own admission against interest, does not necessarily rebut the presumption of maternity flowing from her taking Karen into her home and raising her as her own child. Rather, a determination must be made whether this is "an appropriate action" to rule that the presumption has been rebutted by clear and convincing evidence.
>
> *In re Karen C.*, supra, 101 Cal.App.4th 936-938.

The *Amy G.* court distinguished *Karen C.*, "the birth mother was absent and there was no competing claim to maternity." *Amy G. v. M.W.* supra, 142 Cal.App.4th 1, 13

In his dissent in *Troxel*, Justice Stevens observes that a parent's rights with respect to her child are limited by the existence of an actual, developed relationship with the child,

> A parent's rights with respect to her child have thus never been regarded as absolute, but rather are limited by the existence of an actual, developed relationship with a child, and are tied to the presence or absence of some embodiment of family.
>
> *Troxel v. Granville*, supra. 530 U.S. 87-88 (Stevens, diss.).

California's appellate court gave short shrift to whether the judicially-created conclusive "pregnancy presumption" serves that public policy goal. Under the *Amy G.* decision, despite the absence of any significant embodiment of a family relationship, Kim's pregnancy requires that she be recognized as Nathan's mother, even though a birth father who turned the child over to the mother and her husband, would not be entitled to automatic parenthood.

Here, if the law applied the same standard to maternity and paternity cases, the trial court could have considered whether the gestational bonds outweighed years of day-to-

day childrearing, where the birth mother gave the child to the father and his wife to raise as a child of their marriage, and subsequently changed her mind. The biological differences between men and women would not have been irrelevant – men can't assert gestational bonds – and the court would have been free to consider the nature of those bonds in the relationship between this child and the two women competing for legal-mother status.

If gestation is sufficiently powerful to regulate parental status, may states also apply a maternal preference in child-custody cases?

D. *Fit Between Gender-Neutral Custody and Support Law and Gender-Based Parentage Scheme. Can a state that proclaims gender irrelevant to the exercise of the rights and responsibilities of parenthood, rely on gender-based generalities when regulating who gets those rights?*

Establishing parentage is the gateway to the rights, opportunity and responsibilities to raise a child, and to the responsibilities of child support. Parties usually bring parentage-establishment actions to secure custody and visitation rights or impose child support obligations.[4]

Twenty-first century American family law is almost entirely gender-neutral. For example, California's Family Code prohibits consideration of gender in child custody decisions (Cal. Fam. Code §3040(a)(1)), and is silent about

---

[4] This Court has held that the rights of non-parents to relationships with children are very limited. *Troxel v. Granville*, supra, 530 U.S. 57. In California, the differences between the rights of parents and non-parents are great. Non-parents only receive custody when parental custody would be detrimental to a child. Cal. Fam. Code §3041. Parties may also establish parentage to secure rights to inheritance, government or insurance benefits, wrongful-death damages or other derivative rights. A non-custodial parent automatically gets custody of a child in the event a custodial parent dies or abandons the child. Cal. Fam. Code §3010.

gender when awarding child and spousal support (Cal. Fam. Code §§3500-3558).

It is hard to reconcile a state's use of gender-based generalities to decide *who is a parent*, when its laws prohibit consideration gender to decide *who has custody, or pays support*.

This question has broader implications than these facts present. If states may conclude that gestational bonds outweigh all other factors, then states may constitutionally enact a maternal preference for child-custody as well. By articulating a clear standard for the gender claims raised in this case, this Court will provide important guidance for a broader scope of custody and parentage cases heard in state courts.

E. Conclusion: This case provides an opportunity for this Court to clearly articulate a more unified view of the constitutional parameters governing state resort to gender-based classifications in parentage and custody matters.

The constitutional principles and issues presented by this case have broad application to American family law. Gender issues recur, in many guises, in family court parentage, custody, visitation, guardianship and child-protection cases across this nation.

Maternity cases are becoming more frequent. In just California alone in recent years, a number of maternity cases have resulted in published appellate decisions. Gender-neutral parentage laws would apply to each of those cases, and may have changed the outcome in some of them.[5]

---

[5] See, for example, *Adoption of Matthew B.*, 232 Cal.App.3d 1239 (Cal. 1991) (traditional surrogacy); *Johnson v. Calvert*, 5 Cal.4th 8 (Cal. 1993) (gestational surrogacy); *Marriage of Moschetta*, 25 Cal.App.4th 121 (Cal.1994) (gestational surrogacy); *Prato-Morrison v. Doe*, 103 Cal.App.4th 222 (Cal. 2002) (embryo misappropriation); *In re Karen C.*, supra, 101 Cal.App.4th 93 (de facto adoption); *Robert B. v. Susan B.*, 109 Cal.App.4th 110 (Cal. 2003) (embryo misappropriation); *In re Salvador M.*, 111 Cal.App.4th 135 (Cal. 2003) (adult

The proliferation of so many published maternity decisions, in a single state illustrates the importance of the question presented by this case.

This Court has not considered a family-law case involving the constitutionally-protected parent-child relationships in the eight years since *Troxel*. Yet family law occupies a huge percentage of state trial court calendars, and plays a tremendous role in American jurisprudence.

Litigation, with its often overwhelming stressors, expense, and terrifying uncertainties, is hard on families and children. Few family law cases reach this Court, not because few have constitutional ramifications, and not because family law is almost entirely governed by state law. This Court gets few of these cases because so few families have the economic and emotional wherewithal to come so far. The number of family law cases this Court accepts are disproportionately small to numbers of cases they impact, the impact this Court's family law decisions have on the lives of ordinary Americans. Most Americans' only contact with the justice system will be in family court or traffic court.

The more guidance states have about the constitutional parameters of family law, the less litigation families will have to endure. When this Court finds common ground and provides clear guidance, families and children benefit. State family law courts, struggling to manage overwhelming caseloads, also benefit greatly when this Court provides clear guidance.

This case comes to this Court with a clean record, and a clear question. It provides an excellent vehicle for this Court

---

sibling raising mother's child as her own); *Elisa B. v. Superior Court*, supra, 37 Cal.4th 108 (county child-support agency seeks support from non-biological lesbian co-parent); *K.M. v. E.G.*, 37 Cal.4th 130 (Cal. 2005) (lesbian couple uses one partner's eggs to impregnate other partner); and *Kristine H. v. Lisa R.*, 37 Cal.4th 156 (Cal. 2005) (lesbian couple, pre-birth parentage stipulation and judgment).

to address the relationship between gender-based state laws, and fundamental liberty interests in parent-child relationships.

The human issues presented by this class of cases is compelling. This Court has yet to address the specific question this case presents. America's family courts, many American children, and many American families will be spared uncertainty and heartbreak if this Court reviews the decision below, and provides clear guidance.

The Petition for a Writ of Certiori should be granted.

Respectfully submitted,

Leslie Ellen Shear
Counsel of Record (Admitted 1988)
16830 Ventura Blvd., Suite 347
Encino, CA 91436-1749
(818) 501-3691

Robert J. Friedman
9454 Wilshire Blvd., Suite 500
Beverly Hills, CA 90012-2908
(310) 273-2959

Counsel for Petitioner G.G.

Diane M. Goodman
Goodman & Metz
17043 Ventura Boulevard
Encino, CA 91316-4128
(818) 386-2889

Counsel for Petitioner Amy G.

February 26, 2007

APPENDICES

INDEX TO APPENDICES

Appendix A Decision of California Court of Appeals 1a

Appendix B Decisions of Superior Court of California 1b

Appendix C Decision of California Supreme Court . 1c

Appendix D California Statutes 1d

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

Amy G.,
Plaintiff and Appellant,
v.
M. W.,
Defendant and Respondent;
G. G.,
Defendant and Appellant.

G. G.,
Petitioner,
v.
SUPERIOR COURT OF LOS ANGELES COUNTY,
Respondent;
M. W.,
Real Party in Interest.

B182101
(Los Angeles County
Super. Ct. No. BF024437)

B187828
(Los Angeles County
Super. Ct. No. BF023845)

COURT OF APPEAL
SECOND DIST.
FILED
AUG 17 2006
JOSEPH A. LANE, Clerk

APPEAL from an order of the Superior Court of Los Angeles County, Mitchell L. Beckloff, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

PETITION for Writ of Prohibition. Petition denied.

APPENDIX A

Goodman & Metz and Diane M. Goodman for Plaintiff and Appellant Amy G.

Leslie Ellen Shear; and Robert J. Friedman for Defendant, Appellant and Petitioner G. G.

No appearance for Respondent Superior Court of Los Angeles County.

Law Office of Levin & Margolin, Lionel P. Levin; Barbakow & Ribet and Claudia Ribet for Defendant, Respondent and Real Party in Interest M. W.

INTRODUCTION

M. W. (hereafter Kim) and G. G. (father) are the biological parents of three year-old Nathan. Father and his wife, Amy, have raised Nathan in their home since he was one month old.

In an action brought by Kim for custody and visitation rights to her biological child, the trial court denied father's motion to join Amy as a party. Father filed a petition for writ of prohibition to vacate the court's order and to join Amy in the action.

Amy also brought a separate action against Kim and father, to be declared Nathan's presumed mother; the trial court granted Kim's motion to quash and dismissed that action. Amy and father appealed that order.

In this consolidated petition and appeal, father and Amy argue that Amy is Nathan's presumed mother, and therefore the trial court erred in denying Amy joinder or standing. Father and Amy's arguments present the question of whether the statutory presumptions of paternity contained in the Family Code enable the wife of a man who fathered a child in an extramarital relationship to assert status as the child's mother, when the child's biological mother has come forward promptly to assert her maternal rights.

We answer no, and affirm. We uphold the trial court's denial of father's motion to join Amy and its order granting Kim's motion to quash Amy's independent action.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Facts.*

Father is married to Amy. During his marriage to Amy, he had an extramarital relationship with Kim, the real party in interest. That relationship resulted in a child, Nathan.

During her relationship with father, Kim was married to Steven, but they were at the time of Nathan's conception and birth.

Nathan is Kim's only child. Father and Amy have two daughters.

The parties disagree as to their intent and as to the circumstances of Nathan's conception and birth. Father asserts Kim offered to bear a child who would be raised as a child of his marriage to Amy. Kim contends her relationship with father was romantic, the pregnancy was unplanned, and that she expected they would raise Nathan jointly.

Kim concealed her pregnancy from business associates, acquaintances, family and friends and left California for Virginia, where she gave birth to Nathan. Kim cared for Nathan during his first month in Virginia.

In June 2003, when Nathan was one-month old, father came to Virginia to take him to California. Father met with Kim in a hotel lobby. He presented Kim with an "Agreement Regarding Custody and Adoption" (the Agreement), drafted by a Maryland law firm he had retained.

The Agreement provided: father would have sole custody over Nathan; Kim would have no visitation; and Kim consented to a stepparent adoption by Amy.

The Agreement also contained recitals to the effect that Kim acknowledged and was aware of her right to obtain independent counsel, father's counsel had not provided her with any legal advice in connection with the Agreement, she was executing the Agreement freely and voluntarily, and the Agreement was not the product of any fraud, duress or undue influence. Kim and father signed the Agreement

while sitting in father's limousine.[1]

Kim did not have a lawyer when she signed the document. She contends she did not understand what she was signing and felt pressured to do so.

After signing the Agreement, they returned to the hotel lobby where father picked up Nathan. Kim handed father all of Nathan's clothes, formula, diapers and toys.

That evening, father flew with Nathan back to Los Angeles.

Since June 29, 2003, Nathan has lived continuously with father and his family and has never been alone with Kim.

2. *Proceedings.*

On September 29, 2003, Kim filed a petition against father to establish parental relationship, seeking child support, custody and visitation. Thereafter, Kim brought an order to show cause. Kim did not serve the papers until November 11, 2003.

Father responded, requesting the court to deny Kim the relief she requested and to enter a judgment of parentage recognizing Amy as the mother.

a. *Father's initial motion for joinder of Amy as a necessary party.*

On December 18, 2003, at a hearing on Kim's order to show cause, father argued that Amy was a necessary party and Kim's custody request could not be heard without Amy's joinder. The trial court denied father's request for joinder, ruling, inter alia, Amy "is completely aligned" with father and therefore her interests were adequately protected.

In a supplemental memorandum of points and authorities, father unsuccessfully argued, inter alia, Amy was the presumed natural mother of Nathan pursuant to Family Code section 7611, subdivision (d) "because she has taken him into her home, held him out as her son, and played all

---

[1] Amy did not pursue a stepparent adoption of Nathan.

the social, psychological and economic roles of mother since he was one month old . . . ."[2]

b. *Amy's independent action to establish parental relationship.*

On January 26, 2004, after father failed in his attempt to join Amy in Kim's action, Amy filed a separate action, naming Kim and father, to establish her status as Nathan's mother. Amy brought the action pursuant to section 7650, which provides in relevant part: "Any interested person may bring an action to determine the existence or nonexistence of a mother and child relationship." (§ 7650, subd. (a).)

On June 23, 2004, the trial court granted Kim's motion to quash, ruling that Amy was not an interested person within the meaning of section 7650 because she was not biologically related to the child with whom she sought to establish a parental relationship.

Thereafter, the trial court granted reconsideration, again granted the motion to quash, and dismissed Amy's action with prejudice.

On March 24, 2005, Amy and father filed a timely notice of appeal from the order of dismissal.

c. *Proceedings in Kim's action; trial court again denies joinder of Amy.*

Turning our focus back to Kim's action, on February 9, 2004, the trial court ordered that Kim have monitored visitation with Nathan for four hours per week.

On March 12, 2004, the parties stipulated to the appointment of Dr. Jeffrey Lulow to conduct a child custody evaluation.

On August 15, 2005, father filed a written motion for joinder of Amy as well as Steven. With respect to the facts showing that Amy was either indispensable or a necessary party, the motion denied Kim's parentage and contended:

---

[2] All further statutory references are to the Family Code, unless otherwise indicated.

Amy is Nathan's mother, Amy "has exercised actual custody of Nathan and asserted custody rights since Nathan was less than a month old" and a complete and effective judgment could not be had without joining Amy as a party.

Father also sought to join Steven, Kim's husband at the time of the child's conception and birth, in order to establish father's paternity with finality.

Father argued joinder was mandatory and complete relief could not be had without joining Amy and Steven as parties.

On August 30, 2005, nearly 18 months after the March 12, 2004 order appointing Dr. Lulow, he completed his evaluation.

On September 15, 2005, Steven filed a responsive declaration stating he was making no claim to parentage of Nathan, that he was willing to appear in the action solely for the purpose of entering into a binding waiver of a claim to parentage, and that he did not wish to be otherwise joined as a party to the litigation.

By way of opposition to the joinder motion, Kim argued Amy was merely a stepparent and she had no standing to allege maternity.

On October 21, 2005, the matter came on for hearing. The trial court refused to take judicial notice of the child custody evaluation for purposes of the joinder motion and stated it had not read the report. The trial court denied father's motion for joinder of Amy and Steven.[3]

The reporter's transcript of the hearing on the joinder motion sets forth the trial court's reasoning herein. The trial court repeatedly asked, "How is Amy . . . any different

---

[3] This court has reviewed Dr. Lulow's report, which discusses, inter alia, the bond between Amy and Nathan. The contents of the report do not affect our legal interpretation with respect to the application of the parentage statutes.

from a live-in nanny?"[4] The trial court also commented, "[Amy] doesn't have custody rights. [Father] has custody rights. And she happens to live with [father]."

d. *Subsequent proceedings.*

On December 19, 2005, father filed the instant petition for writ of prohibition or other appropriate relief, seeking to preclude the trial court from conducting a trial in this matter without first joining Amy and Steven as parties.

This court issued an order to show cause, stayed proceedings in the trial court, granted a motion to expedite the appeal, and consolidated the appeal and the writ petition for hearing before this court.

CONTENTIONS

In the writ petition and appeal, Amy and father contend the trial court erred in denying father's motion to join Amy and in granting Kim's motion to quash Amy's independent action. We summarize their contentions as follows:

1. Amy must be joined in the action pursuant to Code of Civil Procedure section 389, subdivision (a), and Family Law Rules, rule 5.158(a);[5]

2. Amy is an "interested person" under section 7650, subdivision (a), and therefore has standing to maintain her independent action to establish a mother-child relationship;

3. Section 7650, subdivision (a), mandates gender-neutral application of the presumed father statutes;

4. Amy is Nathan's presumed mother under sections 7611, subdivisions (a) and (d), and 7540;

5. Any interpretation of the relevant Family Code provisions to deny Amy joinder or standing violates equal protection and due process; and

---

[4] Although we affirm the trial court's decision, we find this comment, comparing Amy to a domestic employee, unfortunate.

[5] All further rule references are to the Family Law Rules.

6. Amy has standing to assert equitable estoppel.

Father additionally contends the trial court erred in failing to join Steven.

We reject all of their contentions. We find no error in the trial court's denial of father's motion to join Amy, and therefore deny father's petition for writ of prohibition. We also affirm the trial court's grant of Kim's motion to quash Amy's independent action.

DISCUSSION

1. *Standard of review*

The essential facts, including Kim's status as Nathan's biological mother, father's biological paternity, and Amy's status as father's spouse, are undisputed. Therefore, the essential issue presented is whether Amy is entitled to joinder or standing pursuant to provisions found in either the Code of Civil Procedure or the Family Code. "Statutory interpretation is a question of law, which appellate courts review de novo. [Citations.]" (*Librers v. Black* (2005) 129 Cal.App.4th 114, 124.)

2. *Overview of arguments: pertinent joinder and standing provisions invoked by father and Amy.*

   a. *Compulsory joinder: Code of Civil Procedure section 389, subdivision (a).*

Generally, a person "shall be joined as a party in the action if . . . [she] claims an interest relating to the subject of the action and is so situated that the disposition of the action in [her] absence may . . . as a practical matter impair or impede [her] ability to protect that interest . . . ." (Code Civ. Proc., § 389, subd. (a).)

County of Los Angeles v. Sheldon P. (2002) 102 Cal.App. 4th 1337, held a person who meets the criteria of Code of Civil Procedure section 389, subdivision (a), must be joined even if the person to be joined has little chance of prevailing on the merits. In that case, the child's biological father requested another man be joined who was not the child's biological father and who had no social relationship with

the child, but who had signed a voluntary declaration of paternity at the time the child was born. (*Sheldon P., supra*, at pp. 1342-1344.) Because the voluntary declaration of paternity gave the other man status as a presumed father and entitled him to certain rights, and that person's absence from the action could impair that person's interest, joinder was required. (*Id.* at pp. 1344-1345.)

Father contends that, like the voluntary declarant in *Sheldon P.* who had a claim to be the child's father, Amy has a claim to be Nathan's mother. Therefore, Amy's joinder is mandatory pursuant to Code of Civil Procedure section 389, subdivision (a), because her absence in this action will impede or impair her ability to protect this interest.

b. *Joinder under section 7635, subdivision (b).*

Section 7635, subdivision (b), sets forth persons who may be made parties to a *parentage* action. "The natural mother, each man presumed to be the father under Section 7611, and each man alleged to be the natural father, may be made parties and shall be given notice of the action . . . and an opportunity to be heard." (§ 7635, subd. (b).)

Generally, the rules set forth in the Uniform Parentage Act (UPA) (§ 7600 et seq.) pertaining to paternity actions apply equally to maternity actions under section 7650, subdivision (a).[6] Father argues we read section 7635, subdivision (b), in a gender-neutral manner, thus *requiring*[7] Amy's joinder. (§§ 7650, subd. (a), 7635, subd. (b).)

---

[6] Section 7650, subdivision (a) reads in full, "Any interested person may bring an action to determine the existence or nonexistence of a mother and child relationship. Insofar as practicable, the provisions of this part [the UPA] applicable to the father and child relationship apply."

[7] The language "may be made parties" in section 7635, subdivision (b), suggests this section is a permissive joinder rule, not a mandatory joinder rule. However, because we find Amy cannot be Nathan's presumed mother under section 7611 or Nathan's natural mother, we need not decide whether the trial court erred in refusing to grant Amy permissive joinder in the action.

c. *Joinder under rule 5.158(a).*

Rule 5.158(a) provides: "The court must order joined as a party to the proceeding any person the court discovers has physical custody or claims custody or visitation rights *with respect to any minor child of the marriage.*" (Italics added.) Father and Amy do not dispute Nathan's birth arose from an extramarital affair between father and Kim, and not from the marital relationship between father and Amy. Father and Amy do not claim to have adopted Nathan. Rather, they argue, through a gender-neutral application of the Family Code, Nathan is *presumed* to be a child of the marriage because Amy was married to and cohabiting with father when Nathan was born. (§ 7540.) Because Amy claims custody over Nathan, and Amy and father argue Nathan is a presumed child of the marriage, father contends Amy must be made a party to the action.

d. *Standing to bring maternity action under section 7650, subdivision (a).*

Section 7650, subdivision (a) allows any "interested person" standing to bring a maternity action. Father and Amy argue Amy is an "interested person" because she claims to be Nathan's mother, and therefore the trial court erred in granting Kim's motion to quash Amy's independent action.

Having set forth father and Amy's theories, we now turn to the merits.

3. *Father and Amy's arguments are unavailing because Amy cannot be deemed to be Nathan's mother.*

As outlined above, father and Amy's arguments all are predicated on Amy's claim she is Nathan's mother. Therefore, our threshold question is whether Amy can assert status as Nathan's mother in view of the undisputed fact that Kim, a party to both actions, is Nathan's biological mother.

Amy and father advance several arguments as to why Amy can allege status as Nathan's mother. Amy and father allege Amy is Nathan's presumed mother under section 7611, subdivisions (a) and (d). They further allege Amy is

conclusively presumed to be Nathan's mother under section 7540. They also take the position Amy is Nathan's natural mother within the meaning of section 7635, subdivision (b). Based on any and all of these claims, Amy and father argue Amy is entitled either to joinder in Kim's action or to standing to bring an independent maternity action. As explained, none of these theories has merit.

a. *Amy cannot establish status as Nathan's presumed mother under section 7611, subdivisions (a) and (d).*

Section 7611 sets forth various circumstances wherein the court will presume a man to be a child's father. "A man is presumed to be the natural father of the child if . . . [¶] (a) He and the child's natural mother are or have been married to each other and the child is born during the marriage . . . ." (§ 7611, subd. (a).) A man is also presumed to be the natural father of the child if "[h]e receives the child into his home and openly holds out the child as his natural child." (§ 7611, subd. (d).)

The UPA specifically provides *maternity* may be established "by proof of her having given birth to the child, *or under this part* [i.e., the UPA, § 7600 et seq]." (§ 7610, subd. (a), italics added.)[8] The UPA also provides, as discussed above, the rules pertaining to paternity actions apply equally to maternity actions. (§ 7650, subd. (a).) Therefore, the question presented is the applicability of section 7611, pertaining to presumed fathers, to Amy.

In general, California law only recognizes one mother. (*Johnson v. Calvert* (1993) 5 Cal.4th 84, 92, fn. 8.) Amy and father do not dispute that Kim gave birth to Nathan, making Kim the natural mother under section 7610, subdivision (a). However, because section 7610, subdivision (a), provides maternity may be established "by proof of her

---

[8] In contrast, the father and child relationship may be established simply "under this part." (§ 7610, subd. (b).)

having given birth to the child, *or under this part* [i.e., the UPA]" (§ 7610, subd. (a), italics added), Amy and father assert Amy's maternity based on the presumed father provisions of section 7611, subdivisions (a) and (d), which they seek to apply in a gender-neutral manner. Amy and father argue Amy is Nathan's presumed mother under section 7611, subdivision (a), by virtue of her marriage to father, and under section 7611, subdivision (d), because she received Nathan into her home and held him out as her own child. Neither the case law nor the statutory framework supports this argument.

In limited circumstances, the presumptions of paternity listed in section 7611 have been interpreted to apply to women. (*See, e.g., In re Karen C.* (2002) 101 Cal.App.4th 932, 937-938; *In re Salvador M.* (2003) 111 Cal.App.4th 1353, 1357-1358; *Elisa B. v. Superior Court* (2005) 37 Cal.4th 108, 119-120, 125.)

In *Karen C.*, the birth mother gave her child to another woman when the child was born and subsequently absented herself. (*In re Karen C., supra*, 101 Cal.App.4th at p. 934.) The other woman, who took the child into her home and raised the child as her own, was presumed to be the child's mother under section 7611, subdivision (d). (*Id.* at p. 938.) Similarly, in *Salvador M.*, where the birth mother was deceased, the child's adult half-sister who raised the child since his mother's death was presumed to be his mother under section 7611, subdivision (d). (*In re Salvador M., supra*, 111 Cal.App.4th at pp. 1355-1358.) Thus, in both *Karen C.* and *Salvador M.*, the birth mother was absent and there was no competing claim to maternity.

Elisa B. applied section 7611, subdivision (d), to declare a woman, Elisa, a presumed mother of the twin children born to her same-sex partner, Emily. (*Elisa B. v. Superior Court, supra*, 37 Cal.4th at pp. 113-114, 125.) After the relationship ended, a county district attorney sued Elisa for child support on behalf of the twins. (*Id.* at pp. 113, 115.) Elisa had actively participated in causing the children to be conceived with the understanding that she would raise the

children as her own together with Emily. Once the children were born, Elisa received them into her home and openly held them out as her own. (*Id.* at pp. 113, 125.) Given these circumstances, the court declared Elisa a presumed mother under section 7611, subdivision (d), perceiving "no reason" why both parents of a child cannot be women. (*Elisa B. v. Superior Court, supra,* at pp. 119, 125.) In reaching this conclusion, the court specifically noted there were "*no competing claims to her being the children's second parent.*" (*Id.* at p. 125, italics added.)

Father and Amy rely on *Elisa B.* for the proposition that section 7611 should apply in maternity cases even where the child's birth mother is present and asserts legal parenthood. However, *Elisa B.* is distinguishable. Here, Nathan's natural father is known and present in the action. Nathan only can have one additional parent. Both father and Amy concede that Kim is Nathan's biological mother. By alleging presumed maternity, Amy advances a competing claim to be Nathan's second parent. Because the absence of a competing claim to be the second parent specifically drove the Elisa B. court's decision, *Elisa B.* cannot control this case.

The cases cited by Amy and father where the courts applied the presumed father statute, section 7611, to recognize a presumed mother all involved circumstances where there was *no competing claim* to be the child's mother or second parent. (*Elisa B. v. Superior Court, supra,* 37 Cal.4th at p. 125; *In re Karen C., supra,* 101 Cal.App.4th at p. 938; *In re Salvador M., supra,* 111 Cal.App.4th at p. 1359.) Here, unlike those cases, both the child's biological father and biological mother have identified themselves and come forward to assert their legal parentage. Under these circumstances, it is not appropriate to invoke a gender-neutral reading of the paternity presumptions to provide Nathan with another mother. To allow Amy an opportunity to be declared Nathan's mother through a gender-neutral reading of the UPA would arrive at an impracticable result. (§ 7650, subd. (a).)

b. Jesusa V. is unavailing to father and Amy.

Moreover, the UPA framework does not support Amy's joinder or standing as an alleged presumed mother under section 7611 because the statutory scheme provides no mechanism to resolve her and Kim's competing maternity claims. Amy and father argue section 7612, subdivision (b), would direct the trial court to weigh evidence pertaining to "policy and logic" to determine whether Amy or Kim would prevail as Nathan's legal mother.[9] (§ 7612, subd. (b).)

In support of their theory, Father and Amy cite *In re Jesusa V.* (2004) 32 Cal.4th 588. In that case, section 7612, subdivision (b), was utilized to resolve competing paternity claims between the child's biological father, who qualified under section 7611, subdivision (d), and the mother's husband, who qualified under section 7611, subdivisions (a) and (d). (*In re Jesusa V., supra*, 32 Cal.4th at pp. 603-607; *see also Craig L. v. Sandy S.* (2004) 125 Cal.App.4th 36, 53 [applying *Jesusa V.* to competing claims of paternity].)

Father and Amy's argument fails because, unlike *Jesusa V.*, this case does not present a conflict between two persons presumed to be a child's parent under section 7611. Kim is not Nathan's presumed mother under section 7611; rather her maternity is established under section 7610, subdivision (a), based on her having given birth to Nathan.

Section 7612, subdivision (b), specifically applies to "two or more presumptions aris[ing] under Section 7611," such as was the case in *Jesusa V.* (§ 7612, subd. (b); *In re Jesusa V., supra*, 32 Cal.4th at pp. 603, 607.) Accordingly, section 7612, subdivision (b), does not apply where a presumed maternity claim arising under a genderneutral reading of section 7611 conflicts with a maternity claim pursuant to section 7610, subdivision (a). No mechanism exists in other provisions of the UPA to resolve such a conflict. Therefore, we do not find the UPA framework allows Amy an opportu-

---

[9] Section 7612, subdivision (b), reads in full: "If two or more presumptions arise under Section 7611 which conflict with each other, the presumption which on the facts is founded on the weightier considerations of policy and logic controls."

nity to assert status as Nathan's presumed mother where Kim, Nathan's biological mother, has come forward promptly to assert her maternal rights.

c. *Amy is not Nathan's presumed mother under section 7540.*

Father and Amy alternatively contend Amy is conclusively presumed to be mother under section 7540, which provides, "*Except as provided in Section 7541*, the child of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage." (§ 7540, italics added.) According to father and Amy, because section 7650, subdivision (a), mandates application of paternity rules to maternity actions, Nathan is conclusively presumed to be a child of father and Amy's marriage under section 7540.

Their argument is without merit. In their interpretation of section 7540, Amy and father overlook the statute's qualifying phrase "*Except as provided in Section 7541 . . . .*" (§ 7540, italics added.) Section 7541, subdivision (a), overrides the presumption of paternity under section 7540 if blood tests reveal that the biological mother's husband is not the father of the child.[10] Assuming arguendo, we apply a gender-neutral reading of section 7540, we must also apply a gender-neutral reading of section 7541, which would negate a wife's conclusive presumption of maternity when blood tests reveal she is not the mother of the child.

Here, no blood tests are required. It is undisputed that Kim, not Amy, is Nathan's biological mother. Accordingly, Amy cannot enjoy a conclusive presumption of maternity under section 7540.

---

[10] Section 7541, subdivision (a), reads in full: "Notwithstanding Section 7540, if the court finds that the conclusions of all the experts, as disclosed by the evidence based on blood tests performed pursuant to Chapter 2 (commencing with Section 7550), are that the husband is not the father of the child, the question of paternity of the husband shall be resolved accordingly."

d. *Amy cannot assert status as Nathan's natural mother*

We also reject Amy and father's additional suggestion that Amy is Nathan's natural mother, and therefore can be joined pursuant to section 7635, subdivision (b). While the word "natural" is not always interpreted as synonymous with "biological," (*see, e.g., In re Nicholas H.* (2002) 28 Cal.4th 56, 64), the language of section 7635, subdivision (b), expressly refers to the "natural mother" and also differentiates between "each man *presumed* to be the father under Section 7611, and each man alleged to be the *natural* father . . . ." (§ 7635, subd. (b), italics added.) Because the statutory language provides this distinction, we interpret "natural mother" here to refer to the biological mother. Thus, Amy cannot be deemed to be Nathan's natural mother.

e. *Preliminary conclusion: trial court did not err in refusing to join Amy or in granting Kim's motion to quash Amy's separate action.*

For the reasons discussed above, we hold, where as here, a birth mother promptly comes forward to assert her legal maternity, and the child's father is undisputed and present in the action, the father's spouse cannot be the child's natural mother or the child's presumed mother through a gender-neutral reading of either section 7611, subdivisions (a) and (d), or section 7540.

Because Amy cannot legally be Nathan's mother under these circumstances, Amy cannot "claim[] an interest relating to the subject of the action" which would require her joinder under Code of Civil Procedure section 389, subdivision (a). Amy is not Nathan's natural mother or presumed mother and therefore is not a person who may be made a party to the action under section 7635, subdivision (b); for the same reasons, she is not an "interested person" within the meaning of section 7650, subdivision (a); and she cannot claim custody rights under rule 5.158(a) because Nathan is not a child of the marriage between Amy and father.

For these reasons, we find no error in either the trial court's denial of father's motion to join Amy or its grant of Kim's motion to quash Amy's independent action.

4. *The statutory scheme does not violate equal protection or due process.*

a. *Equal protection.*

Amy and father contend an interpretation of the statutory scheme which denies Amy joinder or standing violates equal protection.

Father and Amy rely on *Elisa B.* for the proposition that the statutory scheme, if interpreted to deny Amy's joinder, violates equal protection on the basis of sexual orientation. *Elisa B.* held a woman in a same-sex relationship with the biological mother could be declared the child's presumed mother under section 7611, subdivision (d), even though the biological mother is present in the action. (*See Elisa B. v. Superior Court*, *supra*, 37 Cal.4th at pp. 118-119, 125.) Father and Amy argue that to deny Amy a similar opportunity to establish status as a presumed mother effectively treats a heterosexual woman differently than a similarly situated woman in a same-sex relationship.

Relying on *Jesusa V.*, father and Amy also argue that the statutory scheme, if applied to deny Amy's joinder, violates equal protection on the basis of gender. *Jesusa V.* held a man who received a child into his home and held the child out as his own could qualify as the presumed father under section 7611, subdivision (d), even though the biological father also was a party to the proceedings. (*In re Jesusa V.*, *supra*, 32 Cal.4th at pp. 603-604.) Father and Amy argue that to deny Amy a similar opportunity to assert her status as a presumed mother treats a woman differently than a similarly situated man.

These arguments are also without merit. "The first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner." (*In re Eric J.* (1979) 25 Cal.3d 522, 530.) To prevail on either of their equal protection claims,

father and Amy must first demonstrate that Amy is similarly situated to the individuals she describes who have asserted presumed parentage under the statutory scheme. As explained, Amy is not similarly situated to either the biological mother's same-sex partner in *Elisa B.* or the nonbiological presumed father in *Jesusa V.*

In a situation such as *Elisa B.*, where two women are same-sex partners, and one gives birth to a child while the other holds the children out as her own, *there is no third person who claims to be the child's second parent.* In contrast, a woman, such as Amy, who is married to the child's father and wishes to assert presumed maternity, is competing with the child's biological mother for maternal rights. Unlike the circumstances in *Elisa B.*, where it was appropriate to provide a *second* parent for the child, here two parents, Kim and father, already are present in the action. Therefore, we reject Amy's claim she is being denied equal protection based on her sexual orientation.

Likewise, Amy is not similarly situated to a nonbiological father, such as in *Jesusa V.*, who receives his wife's child into his home and holds the child out as his own. While a biological father's genetic contribution to his child may arise from nothing more than a fleeting encounter, the biological mother carries the child for the nine-month gestational period. Because of this inherent difference between men and women with respect to reproduction, the wife of a man who fathered a child with another woman is not similarly situated to a man whose wife was impregnated by another man. Therefore, it is appropriate for the Family Code to allow the birth mother's husband to claim presumed paternity when the biological father is present in the action, and not allow the wife of the biological father to do the same when the biological mother has promptly come forward to assert her parental rights. "The difference between men and women in relation to the birth process is a real one, and the principle of equal protection does not forbid [the Legislature] to address the problem at hand in a manner specific to each gender." (*Tuan Anh Nguyen v. INS* (2001) 533 U.S. 53,

73 [150 L.Ed.2d 115] [upholding a federal law imposing different requirements for citizenship of a child born to one citizen parent and one noncitizen parent, depending upon whether the citizen parent is the mother or the father].) Given Kim's role and presence as Nathan's biological mother, Amy is not similarly situated to a nonbiological presumed father.

Therefore, we reject father and Amy's equal protection arguments.

b. *Due process.*

Father and Amy also contend that the statutory scheme, as applied to deny Amy joinder or standing, violates substantive due process and infringes on family privacy and the integrity of the marital family unit. This argument is unpersuasive. Amy and father are asserting a purported right to raise a child resulting from an extramarital relationship between father and another woman, so as to displace the biological mother. It is unfortunate these proceedings already have spanned nearly three years. However, Kim first sought to assert her maternal rights shortly after Nathan was born, and Kim has since enjoyed monitored visitation with Nathan. Under such circumstances, we perceive no substantive due process or other constitutional claim.

5. *Amy cannot assert equitable estoppel claim arising out of purported stepparent adoption agreement.*

Amy and father contend Amy has standing to assert parentage based on equitable estoppel. Relying on *Adoption of Matthew B.* (1991) 232 Cal.App.3d 1239, they argue Kim is estopped to deny Amy's maternity. *Matthew B.* involved a surrogate mother who sought to withdraw her consent to a stepparent adoption and to obtain periods of custody. (*Id.* at pp. 1252-1253.)

Father and Amy's reliance on *Matthew B.* or on an equitable estoppel theory is misplaced. Kim's role was not that of a surrogate mother. Further, Father and Amy do not assert the purported stepparent adoption agreement executed by Kim is valid. Further, irrespective of whether

the purported agreement is valid, father and Amy never pursued a stepparent adoption by Amy or took any steps to implement the purported agreement. Therefore, we reject their theory that Kim is estopped to deny Amy's maternity.

6. *Trial court did not err in failing to join Steven pursuant to Code of Civil Procedure section 389, subdivision (a).*

Father also contends the trial court erred in failing to join Steven, Kim's husband, because Steven is a mandatory party pursuant to Code of Civil Procedure section 389, subdivision (a).

We recognize *Sheldon P.* required joinder of a man who was a presumed father, even though he had little chance of prevailing on the merits. (*See County of Los Angeles v. Sheldon P.*, *supra*, 102 Cal.App.4th at pp. 1344-1345.) Here, Steven is statutorily presumed to be Nathan's father under section 7611, subdivision (a), by virtue of his marriage to Kim. Because Steven theoretically has a valid claim to be Nathan's father, arguably he must be joined under Code of Civil Procedure section 389, subdivision (a).

However, Nathan's paternity is not an issue in this case. G. G. asserts he is Nathan's father, and Steven concurs. While Steven has not been joined formally as a party in the action, he has received notice of the action and an opportunity to be heard via his September 15, 2005 responsive declaration. In the declaration, Steven eschewed paternity, stating he agreed to enter into a binding waiver of a claim to parentage. Unlike in *Sheldon P.*, where there existed "the potential to deprive . . . the presumed father . . . of rights he wishes to assert," here Steven has agreed to waive all such rights. (*County of Los Angeles v. Sheldon P.*, *supra*, 102 Cal.App.4th at p. 1345.) In *Sheldon P.*, there was at least a theoretical possibility that the absent party would "'claim[] an interest relating to the subject of the action . . . .'" (*Id.* at p. 1344, citing Code Civ. Proc., § 389, subd. (a).) In marked contrast, Steven already has expressly waived any "interest relating to the subject of the action." (Code Civ. Proc., § 389, subd. (a).) Therefore, the trial court properly found Steven's

joinder is not compulsory under Code of Civil Procedure section 389, subdivision (a).

CONCLUSION

We conclude the trial court did not err either in denying father's motion to join Amy in the action or in granting Kim's motion to quash Amy's independent action. When a birth mother promptly comes forward to assert her legal maternity, and the child's father is undisputed and present in the action, the father's spouse cannot be presumed to be the child's mother under any gender-neutral reading of sections 7611, subdivisions (a) or (d), or 7540. Therefore, Amy cannot claim to be Nathan's mother. We further conclude, against father and Amy's contentions, that the trial court's refusal to treat Amy as a presumed mother does not violate equal protection or due process. Finally, we reject Amy and father's contentions that Amy has standing to assert equitable estoppel, and that Steven's joinder is mandatory.

DISPOSITION

The order to show cause is discharged. Father's petition for writ of prohibition or other appropriate relief is denied. The order granting Kim's motion to quash and dismissing Amy's independent action is affirmed. Kim shall recover her costs.

CERTIFIED FOR PUBLICATION

KLEIN, P. J.

We concur:
CROSKEY, J.
KITCHING, J.

SUPERIOR COURT FOR THE STATE OF CALIFORNIA
☐ NO FILE

Date: 09-09-04
HONORABLE MITCHELL L. BECKLOFF
6 H. CONTRERAS. Deputy Sheriff

Dept. CE27
M. DEWEY, Deputy Clerk
K. HONG, Court Assistant
NONE,-Court Reporter

8:30 am BF023845
MIKYUNG WARNER, Petitioner
and
GLADWIN GILL, Respondent

NO APPEARANCES

NATURE OF PROCEEDINGS:
COURT'S RULING ON SUBMITTED MATTER

Gill v . Warner Case No. BF 024437

RULING ON SUBMITTED MATTER

On June 23,2004, this court heard Respondent's Motion to Quash Instant Action. On that date, the court granted Respondent's motion finding that Petitioner did not have standing under Family Code section 7650 to bring this action. More specifically, the court found that under the reasoning of Robert B. v. Susan B. (2003) 109 Cal.App.4th 1009 that Petitioner was not an "interested person" within the meaning of Family Code section 7650 as Petitioner was biologically unrelated to the minor child for whom she sought to establish her parental relationship.

On June 30, 2004, Division Three of the Second Dis-

trict Court of Appeal published its decision in Kristine Renee H. v. Lisa Ann R. 120 Cal.App.4th 143 (2004). That case, specifically noted that Robert B. v. Susan B., supra, 109 Cal.App.4th at 1009 and other cases with similar standing analyses were not based on a gender-neutral application of the law as required by Family Code section 7650. Accordingly, the Court of Appeal in Kristine Renee H. granted standing to a woman in a parentage action even though she had no biological connection to the child at issue in the case.

Based on this new interpretation of the law, Petitioner timely filed her Motion for Reconsideration of Ruling. On July 28,2004, the court heard the motion, granted it, and then heard argument on Respondent's underlying motion to quash.

At the conclusion of the hearing, the court took the matter under submission.

While the matter was under submission, the California Supreme Court granted review in Kristine Renee H. (Cal. Supreme Court, Case No. S126945, Sept 1,2004.) (The California Supreme Court also granted review in two cases with similar issues that had been relied upon by Respondent in her argument before this court: Elisa B. v. Superior Court (2004) 118 Cal.App.4th 966 rev. granted S125912 Sept. 1,2004 and K.M. v. E.G. (2004) 118 Cal.App.4th 477 rev. granted S125643 Sept. 1,2004.)

California Rules of Court, Rule 976(d) specifies that no Court of Appeal opinion may be published where it is superceded by a grant of review by the Supreme Court. An unpublished decision "shall not be cited or relied on by a court. . . in any other action. . . ." (Cal. Rules of Court, Rule 977(a).) (The enumerated exceptions to this rule are inapplicable to this case.)

Accordingly, the court's rationale for granting the motion for reconsideration no longer exists and the case law relied upon by the court in reaching its decision on June 23, 2004 remains. The law supporting Petitioner's position now is as it was on June 23, 2004.

Respondent's Motion to Quash Instant Action filed March 22, 2004 is GRANTED. Respondent is to prepare an Order After Hearing in accordance with California Rules of Court, Rule 391.

A copy of this minute order is sent this date by way of facsimile transmission and first-class mail by the clerk as follows:

Diana Cooper, Esq. FAX: 213-250-9541
Law Offices of Ron Saxman
1200 Wilshire Boulevard Suite 400
Los Angeles, CA 90017-1908

Lionel P, Levin, Esq. FAX: 323-653-1225
Law Offices of Levin & Margolin
8484 Wilshire Boulevard, Suite 660
Beverly Hills, CA 90211-3217

Robert J. Friedman, Esq. FAX: 310-273-2855
Law Offices of Robert J. Friedman
9454 Wilshire Boulevard, Suite 500
Beverly Hills, CA 90212

Leslie Ellen Shear, Esq. FAX: 818-501-3692
Law Offices of Leslie Ellen Shear
16830 Ventura Boulevard, Suite 351
Encino, CA 91436-1796

Diane Goodman, Esq. FAX: 818-986-2889
Goodman & Metz
17043 Ventura Boulevard
Encino, CA 91316-4128

MIKYUNG WARNER vs GLADWIN GILL
CF66100B0288

Dept. CE27
MINUTES ENTERED
09-09-04
CLERK

ORIGINAL FILED
JAN 24 2005
LOS ANGELES SUPERIOR COURT

LAW OFFICES OF LEVIN & MARGOLIN
8484 Wilshire Boulevard, Suite 660
Beverly Hills, California 90211-3217
TELEPHONE: 323/653-1850 ~ FACSIMILE: 323/653-1225

Attorneys for
MIKYUNG WARNER & STEVEN WARNER

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

AMY GILL,
PETITIONER,
V.
MIKYUNG WARNER, STEVEN WARNER, GLADWIN GILL,
RESPONDENTS.

CASE NO. BF024437
ORDER RE DISMISSAL OF ACTION

The Court hereby GRANTS Respondent's MOTION TO QUASH the instant action filed on March 22, 2004, and dismisses the Petition in the within action with prejudice.
Approved as conforming to court order.

No Objection Received

DIANE GOODMAN, Esq.
Attorney for Petitioner Amy Gill
Dated: JAN 24 2005

COMMR. MITCHELL L BECKLOFF, JUDGE PRO TEM
LOS ANGELES SUPERIOR COURT

PROOF OF SERVICE

STATE OF CALIFORNIA)
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the 18 and not a party to the within action. My business address is 8484 Wilshire Boulevard, Suite 660, Beverly Hills, California 90211.

On February 3, 2005, I served the foregoing document described as ORDER RE DISMISSAL OF ACTION on the interested parties to this action by placing a true copy thereof in a sealed envelope, postage prepaid, at Beverly Hills, California, in the ordinary course of business, addressed as follows:

Diane M. Goodman, Esq., GOODMAN & METZ
17043 Ventura Blvd., Encino, CA 91316-4128
Leslie Ellen Shear, Esq.
16830 Ventura Blvd. Encino, CA 91436-1749
Diana D. Cooper, Esq., Law Offices of Ron W. Saxman
1200 Wilshire Blvd., Suite 400, Los Angeles, CA 90017
Robert J. Friedman, Esq.
9454 Wilshire Blvd., Suite 500
Beverly Hills, CA 90212-2908

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. postal service on that same day with postage thereon fully prepaid at Beverly Hills, California, in the ordinary course of business. I am aware on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after the date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on February 3, 2005, at Beverly Hills, California.

Karen L. Dales

LAW OFFICES OF LEVIN & MARGOLIN
8484 Wilshire Boulevard, Suite 660
Beverly Hills, California 90211-3217
TELEPHONE: 323/653-1850 ~ FACSIMILE: 323/653-1225

Attorneys for MIKYUNG WARNER

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

MIKYUNG WARNER, PETITIONER,
v. GLADWIN GILL, RESPONDENT.

CASE NO. BF023845, NOTICE OF RULING
Date: October 21, 2005, Dept: 27

Gladwin Gill's Motion for Joinder came on regularly for hearing on October 21, 2005, in Dept. 27, the Hon. Mitchell Beckloff, Judge Pro Tem, presiding. Appearing on behalf of moving party, Gladwin Gill, was Leslie Shear and Robert Friedman. Moving party was not present in court. Appearing on behalf of Petitioner Mikyung Warner who was present in court was Lionel P. Levin of Levin & Margolin and Diana Cooper of the Law Offices of Ron Saxman.

The Court, after considering the pleadings and argument of counsel, ruled as follows:

1. *Gladwin Gill's* Motion for Joinder is DENIED, effective forthwith,
2. Petitioner's counsel is ordered to prepare a notice of ruling.
3. Moving party's request for a written statement of reasons from the Court is DENIED.

Dated: October 24, 2005

Respectfully submitted,
Law Offices of LEVIN & MARGOLIN
By: Lionel P. Levin, Attorneys for *Mikyung Warner*

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 8484 Wilshire Boulevard, Suite 660, Beverly Hills, California 90211. On October 24, 2005, I served the foregoing document(s) described as NOTICE OF RULING on the interested parties to this action by placing a true copy thereof in a sealed envelope, postage prepaid, at Beverly Hills, California, in the ordinary course of business, addressed as follows:

Leslie Ellen Shear, Esq.
16830 Ventura Blvd.
Encino, CA 91436-1749

Robert J. Friedman, Esq.
9454 Wilshire Blvd., Suite 500
Beverly Hills, CA 90212-2908

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. postal service on that same day with postage thereon fully prepaid at Beverly Hills, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after the date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on October 24, 2005, at Beverly Hills, California.

Karen L. Dales

Court of Appeal, Second Appellate District, Div. 3
No. B182101

S146841

IN THE SUPREME COURT OF CALIFORNIA

SUPREME COURT
FILED
NOV 29 2006
Frederick K. Ohlrich Clerk
DEPUTY

AMY G., Plaintiff and Appellant,
v.
M. W., Defendant and Respondent;
G. G., Defendant and Appellant.

Petition for review denied.

George
Chief Justice

APPENDIX C

CALIFORNIA FAMILY CODES

§7540

Except as provided in Section 7541, the child of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage. (Am & Ren Stats 1993, C 219)

Family Code §7541

(a) Notwithstanding Section 7540, if the court finds that the conclusions of all the experts, as disclosed by the evidence based on blood tests performed pursuant to Chapter 2 (commencing with Section 7550), are that the husband is not the father of the child, the question of paternity of the husband shall be resolved accordingly.

(b) The notice of motion for blood tests under this section may be filed not later than two years from the child's date of birth by the husband, or for the purposes of establishing paternity by the presumed father or the child through or by the child's guardian ad litem. As used in this subdivision, "presumed father" has the meaning given in Sections 7611 and 7612.

(c) The notice of motion for blood tests under this section may be filed by the mother of the child not later than two years from the child's date of birth if the child's biological father has filed an affidavit with the court acknowledging paternity of the child.

(d) The notice of motion for blood tests pursuant to this section shall be supported by a declaration under oath submitted by the moving party stating the factual basis for placing the issue of paternity before the court.

(e) Subdivision (a) does not apply, and blood tests may not be used to challenge paternity, in any of the following cases:

(1) A case that reached final judgment of paternity on or before September 30, 1980.

(2) A case coming within Section 7613.

APPENDIX D

(3) A case in which the wife, with the consent of the husband, conceived by means of a surgical procedure. (Am Stats 1998, C581)

§7611

A man is presumed to be the natural father of a child if he meets the conditions provided in Chapter 1 (commencing with Section 7540) or Chapter 3 (commencing with Section 7570) of Part 2 or in any of the following subdivisions:

(a) He and the child's natural mother are or have been married to each other and the child is born during the marriage, or within 300 days after the marriage is terminated by death, annulment, declaration of invalidity, or divorce, or after a judgment of separation is entered by a court.

(b) Before the child's birth, he and the child's natural mother have attempted to marry each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and either of the following is true:

(1) If the attempted marriage could be declared invalid only by a court, the child is born during the attempted marriage, or within 300 days after its termination by death, annulment, declaration of invalidity, or divorce.

(2) If the attempted marriage is invalid without a court order, the child is born within 300 days after the termination of cohabitation.

(c) After the child's birth, he and the child's natural mother have married, or attempted to marry, each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and either of the following is true:

(1) With his consent, he is named as the child's father on the child's birth certificate.

(2) He is obligated to support the child under a written voluntary promise or by court order.

(d) He receives the child into his home and openly holds out the child as his natural child.

(e) If the child was born and resides in a nation with which the United States engages in an Orderly Departure Program or successor program, he acknowledges that he is the child's father in a declaration under penalty of perjury, as specified in Section 2015.5 of the Code of Civil Procedure. This subdivision shall remain in effect only until January 1, 1997, and on that date shall become inoperative.

(f) The child is in utero after the death of the decedent and the conditions set forth in Section 249.5 of the Probate Code are satisfied. (Am Stats 2004, C775)

§7611.5

Where Section 7611 does not apply, a man shall not be presumed to be the natural father of a child if either of the following is true:

(a) The child was conceived as a result of an act in violation of Section 261 of the Penal Code and the father was convicted of that violation.

(b) The child was conceived as a result of an act in violation of Section 261.5 of the Penal Code, the father was convicted of that violation, and the mother was under the age of 15 years and the father was 21 years of age or older at the time of conception. (Ad Stats 1993, C 219)

§7612

(a) Except as provided in Chapter 1 (commencing with Section 7540) and Chapter 3 (commencing with Section 7570) of Part 2 or in Section 20102, a presumption under Section 7611 is a rebuttable presumption affecting the burden of proof and may be rebutted in an appropriate action only by clear and convincing evidence.

(b) If two or more presumptions arise under Section 7611 which conflict with each other, the presumption which on the facts is founded on the weightier considerations of policy and logic controls.

(c) The presumption under Section 7611 is rebutted by a judgment establishing paternity of the child by another man. (Am Stats 1994, C1269, s54)

[NOTE: Family Code §20102 was repealed in 1993.]

§7635

(a) The child may, if under the age of 12 years, and shall, if 12 years of age or older, be made a party to the action. If the child is a minor and a party to the action, the child shall be represented by a guardian ad litem appointed by the court. The guardian ad litem need not be represented by counsel if the guardian ad litem is a relative of the child.

(b) The natural mother, each man presumed to be the father under Section 7611, and each man alleged to be the natural father, may be made parties and shall be given notice of the action in the manner prescribed in Section 7666 and an opportunity to be heard.

(c) The court may align the parties.

(d) In any initial or subsequent proceeding under this chapter where custody of, or visitation with, a minor child is in issue, the court may, if it determines it would be in the best interest of the minor child, appoint private counsel to represent the interests of the minor child pursuant to Chapter 10 (commencing with Section 3150) of Part 2 of Division 8. (Am Stats 1994, C1269)

§7650

(a) Any interested person may bring an action to determine the existence or nonexistence of a mother and child relationship. Insofar as practicable, the provisions of this part applicable to the father and child relationship apply.

(b) A woman is presumed to be the natural mother of a child if the child is in utero after the death of the decedent and the conditions set forth in Section 249.5 of the Probate Code are satisfied. (Am Stats 2004, C775)

No. 06-1190

In The
Supreme Court of the United States

AMY G. and G.G.,

Petitioners,

v.

M.W.,

Respondent.

On Petition For A Writ Of Certiorari To The California Court Of Appeal Second Appellate District, Division Three

BRIEF IN OPPOSITION

BARBAKOW & RIBET
CLAUDIA RIBET
Counsel of Record
ELIZABETH ANTHONY
301 North Canon Drive, Suite 303
Beverly Hills, California 90210
(310) 860-9162
Attorneys for Respondent, M.W.

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Does the decision below rest on an adequate and independent state ground, namely, that under California law a stepmother cannot displace a natural mother, who promptly asserts her rights, as the mother of a child?

2. Where a woman conceives, bears, and nurses a child, and promptly asserts her parental rights to him after the child is taken by the father, and where California law provides that proof of giving birth establishes the woman as the mother (California Family Code § 7610(a)), does a California court's refusal to allow a stepmother to challenge that rule through use of statutory presumptions concerning paternity violate Equal Protection?

TABLE OF CONTENTS

	Page
Jurisdiction	1
Counter Statement of the Case	1
Summary of Argument	3
Reasons Why the Petition Should be Denied	5
I. This Court Does Not Have Jurisdiction Because Independent State Grounds Support the California Appellate Decision	5
II. Because Amy Is Not Similarly Situated to a Stepfather, No Equal Protection Violation Occurred Here	11
Conclusion	19

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Caban v. Mohammed, 441 U.S. 380 (1979) 17, 18

Lehr v. Robertson, 463 U.S. 248 (1983) 18

Michael H. v. Gerald D., 491 U.S. 110 (1989) 4, 17

Michael M. v. Superior Court of Sonoma County, 450 U.S. 464 (1981) 12

Sochor v. Florida, 504 U.S. 527 (1992) 5

Troxel v. Granville, 530 U.S. 57 (2000) 19

Tuan Anh Nguyen v. I.N.S., 533 U.S. 53 (2001) 12, 14, 15

STATE CASES

Adoption of Kelsey S., 1 C.4th 816 (1992) 4, 18

Amy G. v. M.W., 142 Cal.App.4th 1 (2006) ..... *passim*

Elisa B. v. Superior Court, 37 Cal.4th 108 (2005) 6, 8

In Re Jesusa V., 32 Cal.4th 588 (2004) 7, 13

In Re Karen C., 101 Cal.App.4th 932 (2002) 9

In Re Marriage of Lewis & Goetz, 203 Cal.App.3d 514 (1988) 1

In Re Marriage of Moschetta, 25 Cal.App.4th 1218 (1994) 9

In Re Salvador M., 111 Cal.App.4th 1353 (2003) 9

Johnson v. Calvert, 5 Cal.4th 84 (1993) 1, 6, 8, 11

Miller v. Miller, 64 Cal.App.4th 111 (1998), *cert. denied*, 525 U.S. 1122 (1999) 1

TABLE OF AUTHORITIES – Continued

Page

UNITED STATES CONSTITUTION

Amendment XIV 1, 19

FEDERAL STATUTES AND RULES

28 U.S.C. § 1257(a) 1

Supreme Court Rule 10(a) 3

Supreme Court Rule 15.2 6

CALIFORNIA STATUTES

Evidence Code § 621 [repealed; now Family Code § 7541] 17

Family Code § 2010(b) 1

Family Code § 7540 10

Family Code § 7541 ..... 10, 13, 17

Family Code § 7610(a) 1, 6, 7

Family Code § 7611(a) & (d) 7, 8, 9, 12

Family Code § 7612(b) 7

Family Code § 7635(b) 11

Family Code § 7650(a) 5, 10

MISCELLANEOUS

Miller, Baseline, *Bright-line, Best Interests: A Pragmatic Approach For California to Provide Certainty in Determining Parentage*, 34 McGeorge L.Rev. 637 (2003) 17

JURISDICTION

Petitioners claim this Court has jurisdiction under 28 U.S.C. § 1257(a) (state statute repugnant to the Constitution), and claim a violation of the Equal Protection Clause, but they do not clearly identify which state statute is constitutionally infirm. Petition, p. 1. However, this Court does not have jurisdiction because the decision of the California Court of Appeal is fully defensible on the basis of an independent state ground, namely, that unless a child has been abandoned by its mother, or is the child of a lesbian relationship, California law recognizes only one mother, who cannot by California State law be Petitioner Amy G., a stepmother. California Family Code § 7610(a); *Johnson v. Calvert*, 5 Cal.4th 84, 92 n.8 (1993).

COUNTER STATEMENT OF THE CASE

M.W. (hereafter "Kim") and Petitioner G.G. (hereafter "G.G.") conceived a child, Nathan. Both Kim and G.G. were married to other people at the time of Nathan's conception and birth. G.G. is married to Petitioner Amy G. (hereafter "Amy"). *Amy G. v. M.W.*, 142 Cal.App.4th 1, 4 (2006) (hereafter "*Amy G.*"), Pet. App. 3a.

Nathan is not a "child of the marriage" between his father and stepmother Amy, as alleged in the Petition at page 1.[1] Nathan is a child born to Kim, his biological

[1] "Children of the marriage" include the parties' natural and adopted children, but ***not*** stepchildren. Family Code, § 2010(b); *In Re Marriage of Lewis & Goetz*, 203 Cal.App.3d 514 (1988); *see also Miller v. Miller*, 64 Cal.App.4th 111 (1998), *cert. denied*, 525 U.S. 1122 (1999) (*rejecting* stepfather's claim that he achieved "presumed father" status

(Continued on following page)

mother. As the Court of Appeal stated, "[t]he essential facts, including Kim's status as Nathan's biological mother, father's biological paternity, and Amy's status as father's spouse, are undisputed." *Amy G., supra,* Pet. App. 8a.

It is undisputed that after Nathan's birth, Kim nursed him for a month, and followed him from Virginia to California twenty-four hours after his father took him to that state. (2App. Tab 2, 102-108; 2App. Tab 4, 109, *et seq.*)[2] Within several months of returning to California, Kim sought legal redress for the wrongful taking of Nathan by G.G. Kim filed a petition for maternity, and shortly thereafter filed an order to show cause for custody. *Amy G., supra,* Pet. App. 4a. Thus, as the Court of Appeal noted, Kim acted promptly to obtain custody of her son. *Amy G., supra,* Pet. App. 16a.

The trial court denied G.G.'s oral and written motions to be joined in Kim's motion for custody, Pet. App. 4a, ruling that Kim was Nathan's biological mother, and to give stepmother Amy standing would reward G.G. and Amy for withholding the child from his mother. (Opp.App. 0010, lines 11-21.)[3] The Court of Appeal affirmed. *Amy G., supra*, Pet. App. 21a.

---

under Code § 7611(d) "receiving a child into his home," because he cohabited with mother and she had custody of child half the time).

[2] This Opposition cites to the one-volume record on the direct appeal in the California Court of Appeal as "App." the seven-volume record on the writ proceeding in the Court of Appeal by volume number, *e.g.*, "2App." (Petitioners' Appendix), and to Kim's Appendix to the writ proceeding as "Opp.App."

[3] There is evidence from the trial court proceedings that G.G., who had two daughters with his wife, Amy, but whose Eastern Indian culture prizes male progeny, schemed to remove Kim's male child from her. (1App. Tab 1, p. 84 [prizing of male children]; 2App. Tab 19, pp. 207-208; Opp.App. pp. 159-160 [G.G. taking Nathan away from Kim];

(Continued on following page)

After those motions were denied, stepmother Amy brought an independent action asserting her maternity. The trial court dismissed the action. Pet. App. 4a. The Court of Appeal affirmed this ruling, as well. *Amy G.*, *supra*, Pet. App. 21a.

SUMMARY OF ARGUMENT

This Court does not have jurisdiction to consider this Petition because an adequate and independent state ground supports the decision of the California Court of Appeal. The Court of Appeal held that "where as here, a birth mother promptly comes forward to assert her legal maternity, and the child's father is undisputed and present in the action, the father's spouse cannot be the child's natural mother or the child's presumed mother." *Amy G.*, Pet. App. 16a. That decision is consistent with California Supreme Court precedent concerning parentage and with the California Family Code ("Family Code").

Even if this Court had jurisdiction, certiorari will be granted only for "compelling reasons," such as when "a state court ... has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." Supreme Court Rule 10(a). This Petition does not present

---

Opp.App. pp. 152-154 [G.G. told Kim he was taking Nathan away for a period of time so Kim could get some rest]; 1App. Tab 1, p. 17; 2App. Tab 19, pp. 206-207 [G.G. brought a legal document to Kim, who signed it without understanding what it was].)

the requisite "compelling reasons" for review. The California Court of Appeal decision does not conflict with the decisions of other state or federal courts, or with the cases cited by Petitioners which were decided by this Court.

The relief sought by Petitioners would necessitate a monumental change in California family law, namely, breaking the connection between motherhood and conception, gestation and childbirth in cases not involving child abandonment, surrogacy or adoption. Under the Petitioners' revisionist statutory scheme, giving birth to a child would not be enough to guarantee parental rights to a mother who both actively and promptly seeks them. Redefining motherhood in this way would encourage removal of children from a birth mother's arms (as happened here) in the hope that extra-judicial placement of the child with a marital family would create the requisite "best interests" to mandate termination of a birth mother's rights. This result is not required by anything in the United States Constitution. As the California Supreme Court observed, "We simply do not in our society take children away from their mothers – married or otherwise – because a 'better' adoptive parent can be found." *Adoption of Kelsey S.*, 1 C.4th 816, 846 (1992). This maxim should hold true here, too, where the allegedly "better" choice is a stepmother. Surely a radical leap like this into a new legal world where biology is *never* destiny is a matter for the California legislature to undertake, and not this Court. *See Michael H. v. Gerald D.*, 491 U.S. 110, 129-130 (1989) ("It is a question of legislative policy and not constitutional law whether California will allow the presumed parenthood of a couple desiring to retain a child conceived within and born into their marriage to be rebutted.").

The California Supreme Court declined to review the *Amy G.* case. There is no compelling reason for this Court to do so.

REASONS WHY THE PETITION SHOULD BE DENIED

I. This Court Does Not Have Jurisdiction Because Independent State Grounds Support the California Appellate Decision.

"This Court lacks jurisdiction to review a state court's resolution of an issue of federal law if the state court's decision rests on an adequate and independent state ground." *Sochor v. Florida*, 504 U.S. 527, 533 (1992). The decision below rests on such a ground.

The California Court of Appeal construed California's Family Code to find that the trial court correctly barred a stepmother, Amy, from joining the biological mother, Kim's, parentage action and from pursuing her own parentage action, without the need to employ any presumptions, whether on a gender-neutral basis, or otherwise. The Court of Appeal held, "Under the[] circumstances [of this case], it is not appropriate to invoke a gender-neutral reading of the paternity presumptions to provide Nathan with another mother. To allow Amy an opportunity to be declared Nathan's mother through a gender-neutral reading of the UPA [Uniform Parentage Act] would arrive at an impracticable result." *Amy G., supra,* Pet. App. 13a, citing Family Code § 7650(a) (making provisions of UPA applicable to father-child relationship also applicable to action to determine existence of mother-child relationship only "insofar as practicable"). Thus, independent and

adequate state grounds exist for the decision and review by this Court is precluded.

Several provisions of California's Family Code were operative in this case and were correctly construed by the Court of Appeal. Petitioners significantly misstate California law in this regard. *See* Supreme Court Rule 15(2). They entirely omit from the Petition any citation to or discussion of Family Code § 7610(a), which provides that "[t]he parent and child relationship . . . Between a child and the natural mother . . . may be established by proof of her having given birth to the child[.]" This state statute establishes maternity, not just a presumption thereof. Petitioners disingenuously refer to an "uncodified" or "judicially create[d]" "pregnancy presumption." Petition, p. 9 ("state appellate court has carved out an irrebuttable 'pregnancy presumption' "); p. 13 ("California has adopted an uncodified, irrebuttable 'pregnancy presumption' as a substantive rule of law"); p. 14 (the California decision "judicially creates an irrebuttable presumption"), but that is not the case. Family Code § 7610(a) unambiguously governs this case, as the Court of Appeal correctly held.

Specifically, the Court of Appeal found that since there was no dispute Kim gave birth to Nathan, she was thus Nathan's mother under the state statute, Family Code § 7610, without any need to resort to presumptions. Pet. App. 10a-12a; 15a. Further, the appellate court noted that California law recognizes only one mother, except in lesbian relationships. *Amy G., supra,* Pet. App. 11a-13a, *citing Elisa B. v. Superior Court,* 37 Cal.4th 108, 119-120 (2005); *Johnson v. Calvert*, *supra*, 5 Cal.4th at 92, n.8.

The Court of Appeal accordingly determined that Amy's claim to be a "presumed" mother under Family

Code § 7611(a) and (d)[4] was unsupported by the Uniform Parentage Act (adopted in California as Family Code §§ 7600, *et seq.*), because the statutory scheme provides no mechanism for resolving the competing claims to maternity that would arise in these circumstances. California Family Code § 7612(b) directs the trial court to resolve conflicting presumptions arising *under* Family Code § 7611 using "considerations of policy and logic." However, in this case, there were no conflicting presumptions under section 7611. Rather, Kim's maternity was established (not just presumed) under section 7610(a), based on her having given birth to Nathan. No mechanism exists in the UPA for weighing conflicting maternity claims between a natural mother and a stepmother. The natural mother is the mother. *Amy G.*, *supra*, Pet. App. 11a-15a.[5]

The court explained that although Family Code § 7610(a) provides that the parent and child relationship may be proven by giving birth or "under this part," it is only in unusual circumstances that giving birth has not

---

[4] Family Code §§ 7611(a) and (d), render a man a presumed father if (a) "[h]e and the child's natural mother are or have been married to each other and the child is born during the marriage," or (d) "[h]e receives the child into his home and openly holds out the child as his natural child." Thus, according to Amy, under a gender-interchangeable reading of section 7611, she is Nathan's presumed mother because she was married to Nathan's father and she took Nathan into her home and held him out as her child.

[5] On this point, Amy's reliance on *In re Jesusa V.*, 32 Cal.4th 588 (2004) is unavailing, as that case involved two competing claims for *paternity*, and *both* arose under Family Code § 7611 – that of the biological father, under section 7611(d), the "holding out" statute, and that of the mother's husband, under section 7611(a), by virtue of his marriage to the mother, and also under section 7611(d). Thus, unlike here, *In re Jesusa V.* was an appropriate case for the application of the presumption weighing statute, Family Code § 7612(b).

been found determinative. Pet. App. 12a-13a. One such unusual circumstance was a lesbian relationship in which both partners gave birth to children. In *Elisa B. v. Superior Court*, *supra*, 37 Cal.4th 108, the California Supreme Court found it appropriate to deem Elisa the "presumed mother" of the twins born to her partner during the relationship by applying the Family Code § 7611(d) "holding out" presumption, and thus to find her liable for child support after the couple separated. Critical to the court's analysis, however, were facts not present here: Elisa "actively participated in causing the children to be conceived with the understanding that she would raise the children as her own" and "there [were] no competing claims to her being the children's second parent." *Elisa B., supra,* 37 Cal. at 125. The court also noted the state policy in favor of a child having two parents rather than one. Here, in contrast, mother Kim *is* asserting a competing claim to be Nathan's parent, and Nathan cannot have *three* parents. *Johnson v. Calvert, supra,* 5 Cal.4th at 92 n.8. *Elisa B.* does not support the concept that stepmother Amy should be deemed the mother *instead of* biological mother Kim. Further, unlike Elisa, stepmother Amy played no part in causing Nathan to be conceived in the first place. In short, the court below found that *Elisa B.* is not controlling. Pet. App. 12a-13a.

In the other two cases Petitioners have identified in which courts have applied the presumptions of paternity in section 7611 to women, the birth mother was absent and no competing claim to maternity was being raised. The court below correctly found those cases to be distinguishable on their facts because the presumptions were applied to *determine* the mother, not to *usurp* the mother in favor of another claimant. *See Amy G., supra,* Pet. App.

13a, discussing *In re Karen C.*, 101 Cal.App.4th 932, 937-938 (2002) (birth mother gave child to another woman and absented herself; other woman took child into home and raised it as her own, and was presumed to be child's mother under Family Code § 7611(d)); and *In re Salvador M.*, 111 Cal.App.4th 1353, 1357-1358 (2003) (birth mother was deceased; child's adult half-sister who raised child was presumed to be mother under Family Code § 7611(d)).

Another case, which the Court of Appeal did not discuss but which is highly instructive here, involved a married couple and a surrogate alleging maternal rights. *In re Marriage of Moschetta*, 25 Cal.App.4th 1218 (1994). In *Moschetta*, a California appellate court refused to apply the paternity presumptions in the Uniform Parentage Act to determine which of two women, the surrogate or the wife who intended to raise the child, was the "mother." The husband in that case argued, like stepmother Amy here, that Family Code § 7611(d), the "holding out" provision, should be read in a gender-neutral way so that his wife, who received the child into their home and "held it out" as theirs, should be deemed the presumed mother. The court rejected this argument. Explaining that the function of the parentage law was to settle questions of *biological* parenthood, the court reasoned, "[A]ssuming for the sake of argument that the statutory presumption can be made gender interchangeable, the statutory presumption is inapplicable because of the absence of doubt as to the identity of the natural mother. There is no question of biological parenthood to settle." *Marriage of Moschetta, supra*, 25 Cal.App.4th at 1226. The same is true in this case. No one is disputing that Kim is the biological, gestational mother, or that she promptly asserted her rights.

Under California law, that is the end of the matter. Amy's argument that Kim should be deprived of the child to whom she gave birth is tantamount to asking that Kim be treated like a surrogate for Amy and G.G. The California decisions and statutes do not countenance such a radical result.

Turning back to the decision below, the court also rejected father and stepmother Amy's claim that because Family Code § 7650(a) mandates application of paternity rules to maternity actions "insofar as practicable," Nathan should conclusively be presumed a child of his father and stepmother's marriage under section 7540.[6] The appellate court noted that the father and stepmother's interpretation of section 7540 overlooked the statute's qualifying phrase "Except as provided in Section 7541." Family Code § 7540. Section 7541(a) overrides the presumption of paternity under section 7540 if blood tests reveal that the biological mother's husband is not the father of the child. If a court were to apply a gender-neutral reading of section 7540, it would also have to apply a gender-neutral reading of section 7541, which would negate a wife's conclusive presumption of maternity when blood tests reveal she is not the mother of the child. Here, however, no blood tests are required. It is undisputed that Kim, not stepmother Amy, is Nathan's biological mother. Accordingly, Amy simply cannot enjoy a conclusive presumption of maternity under Family Code § 7540. *Amy G.*, Pet. App. 15a.

---

[6] Family Code § 7540 states "Except as provided in Section 7541 [providing for blood tests], the child of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be the child of the marriage."

Finally, the appellate court rejected stepmother Amy's absurd assertion that she was Nathan's "natural mother" and consequently must be made a party to Kim's action under Family Code § 7635(b). The court pointed out that section 7635(b) allows joinder of the "natural mother," but allows joinder of *both* "each man *presumed* to be the father" *and* "each man alleged to be the *natural* father." *Amy G., supra,* Pet. App.16a, emphasis in original. Given a commonsense reading, the Court of Appeal found that "natural mother" must mean the biological mother, because for fathers, "natural" and "presumed" fathers are separately enumerated. (*Id.*) The California Supreme Court's decision in *Johnson v. Calvert, supra*, 5 Cal.4th 84, supports this reading. In that case (which involved the competing claims of a genetic mother/wife and of a gestational surrogate) the California Supreme Court concluded that "the [Uniform Parentage] Act recognizes both genetic consanguinity and giving birth as means of establishing a mother and child relationship" for purposes of determining "the natural mother under California law." 5 Cal.4th at 93. Kim satisfies both tests.

In summary, the California Court of Appeal's decision rested upon a careful, accurate application of existing California statutory and decisional law whose result would not have been changed by acceptance of Petitioners' equal protection claim. It follows that this Court does not have jurisdiction to review the decision below.

II. Because Stepmother Amy Is Not Similarly Situated to a Stepfather, No Equal Protection Violation Occurred Here.

Stepmother Amy argues that her equal protection rights were violated when the California Court of Appeal

refused to deem her a "presumed mother" under the "presumed father" statutes, which establish a presumption of *paternity* for a man who is married to the mother of a child and/or who takes a child into his home and openly holds himself out as the father. Family Code §§ 7611(a) & (d). Amy's theory, however, rests on the mistaken assumption that she is similarly situated to a stepfather. She is not.

We turn first to the legal requirements for establishing an equal protection claim. "For a gender-based classification to withstand equal protection scrutiny, it must be established 'at least that the [challenged] classification serves important governmental objectives and that the discriminatory means employed are "substantially related to the achievement of those objectives.'" *Tuan Anh Nguyen v. I.N.S.*, 533 U.S. 53, 60-61 (2001) (citations omitted).

Further, the person claiming discriminatory treatment must be similarly situated to others receiving favored treatment:

> [B]ecause the Equal Protection Clause does not "demand that a statute necessarily apply equally to all persons" or require "'things which are different in fact . . . to be treated in law as though they were the same,'" this Court has consistently upheld statutes where the gender classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances.

Michael M. v. Superior Court of Sonoma County, 450 U.S. 464, 469 (1981) (internal citations omitted) (holding that California's statutory rape law did not unlawfully discriminate on the basis of gender because men alone could be held criminally liable thereunder).

Kim was Nathan's one and only mother under Family Code § 7610(a), which, as previously explained, recognizes the simple fact that the person who gives birth to a child is the child's mother. This code section can only apply to women, and to argue otherwise would be absurd. This is so for the obvious reason that, as a matter of biological reality, only women can carry and give birth to a child. Thus, the statute reflects that the sexes are not similarly situated when it comes to the ability to give birth.

The statutory scheme provides a different method for establishing paternity because, again as a matter of biological reality, there is no obvious indicium of fatherhood akin to giving birth. Thus, the statutory scheme provides presumptions of *paternity* according to certain criteria. As noted, Family Code § 7540 provides, "[e]xcept as provided in Section 7541, the child of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage."[7] Further paternity presumptions relevant to this case, again as noted, are the section 7611(a) and (d) "child of the marriage" and "holding out" presumptions.

Stepmother Amy claims that, despite the obvious difference of sex, she is similarly situated to a stepfather. Thus, she argues, relying on *In re Jesusa V.*, 32 Cal.4th 588 (2004), she has an equal protection right to be deemed a "presumed mother" under these statutes. However, as the Court of Appeal aptly pointed out, Amy is not similarly situated to the man in *In re Jesusa V.*:

---

[7] Family Code § 7541 sets forth the blood test mechanism for overcoming this presumption.

> Amy is not similarly situated to a nonbiological father, such as in *Jesusa V.*, who receives his wife's child into his home and holds the child out as his own. While a biological father's genetic contribution to his child may arise from nothing more than a fleeting encounter, the biological mother carries the child for the nine-month gestational period. Because of this inherent difference between men and women with respect to reproduction, the wife of a man who fathered a child with another woman is not similarly situated to a man whose wife was impregnated by another man. Therefore, it is appropriate for the Family Code to allow the birth mother's husband to claim presumed paternity when the biological father is present in the action, and not allow the wife of the biological father to do the same when the biological mother has promptly come forward to assert her parental rights.

Amy G., Pet. App. 18a.

In reaching this conclusion, the Court of Appeal relied on this Court's decision in *Tuan Anh Nguyen v. I.N.S.*, *supra*, 533 U.S. 53. In *Nguyen*, this Court held that there was no equal protection violation where a statute defining citizenship requirements for children born abroad and out of wedlock differed depending on whether the citizen parent was the mother or the father. Specifically, the statute imposed on citizen fathers but not on citizen mothers the duty to take one of three affirmative steps before the child turned 18: legitimation; a declaration of paternity under oath; or a court order of paternity. The Court stated that this requirement was substantially related to two important governmental interests: first, ensuring that a biological parent-child relationship existed; and second, determining that the child and the

citizen parent had a demonstrated opportunity to develop a relationship consisting of "real, everyday ties" providing a connection between the child and the citizen parent, and in turn, with the United States.

This Court's emphasis on the potential for a meaningful parent-child relationship inherent in biological motherhood as opposed to biological fatherhood deserves special focus. The *Nguyen* court explained:

> In the case of a citizen mother and a child born overseas, the opportunity for a meaningful relationship between citizen parent and child inheres in the very event of birth, an event so often critical to our constitutional and statutory understandings of citizenship. The mother knows that the child is in being and is hers and has an initial point of contact with him. There is at least an opportunity for mother and child to develop a real, meaningful relationship. [¶] The same opportunity does not result from the event of birth, as a matter of biological inevitability, in the case of the unwed father. Given the 9-month interval between conception and birth, it is not always certain that a father will know that a child was conceived, nor is it always clear that even the mother will be sure of the father's identity.

Nguyen, 533 U.S. at 65. The Court further declared:

> To fail to acknowledge even our most basic biological differences – such as the fact that a mother must be present at birth but the father need not be – risks making the guarantee of equal protection superficial, and so disserving it. Mechanistic classification of all our differences as stereotypes would operate to obscure those misconceptions and prejudices that are real. The

> distinction embodied in the statutory scheme here at issue is not marked by misconception and prejudice, nor does it show disrespect for either class. The difference between men and women in relation to the birth process is a real one, and the principle of equal protection does not forbid Congress to address the problem at hand in a manner specific to each gender.

Id. at 73.

This reasoning appropriately underlies the California Court of Appeal's decision here that denial of the paternity presumptions to stepmother Amy to counter Kim's undisputed biological maternity did not violate equal protection. As this Court has recognized, the process of conception, gestation and childbirth by its very nature creates the potential for a mother-child bond. In contrast, biological fatherhood alone does not necessarily engender that bond. Thus a stepmother attempting to displace a birth mother is not similarly situated to a stepfather asserting paternity rights as against a biological father. In this case, the process of gestation and childbirth – and a month of nursing and caring for baby Nathan – engendered not just the potential but the reality of a meaningful parental relationship between Kim and Nathan, and given that Kim is both present and promptly asserted her rights, nothing more needs to be determined concerning maternity. Resort to the *paternity* presumptions statutes would be nonsensical. In a scenario involving a stepfather, by contrast, the fact of biological fatherhood alone would not necessarily give rise to the potential for a meaningful relationship. Thus, the paternity presumption statutes make sense; they are appropriate to identify and sort out the biological *and* social factors which create the potential

for a meaningful relationship between the competing men and the child.

For these reasons, *Michael H. v. Gerald D., supra,* 491 U.S. 110, relied upon by Petitioners, is neither controlling nor persuasive. In *Michael H.*, this Court held that a biological father's due process rights were not violated where he was prohibited from challenging the conclusive presumption under the precursor to Family Code § 7541 that his daughter was a "child of the marriage" between the woman with whom he had an affair and the woman's husband. The Court relied for its conclusion on the policy of preserving the integrity of the marital family where a child has been living with its mother and her husband, who has treated the child as his own. However, the Court did not hold that the Constitution mandated the result sought by the Petitioners here. To the contrary, the Court concluded that whether or not a biological father should be allowed to rebut the conclusive "child of the marriage" presumption was a "question of legislative policy and not constitutional law."[8] 491 U.S. at 129-130. And since the identity of the mother was not at issue in *Michael H.*, that case does not conflict with the *Nguyen* case's rule, applicable here, that the fact of gestation and birth is enough to establish who is a child's mother.

This Court's decision in *Caban v. Mohammed*, 441 U.S. 380 (1979) does not support Petitioners' equal protection

---

[8] Note that in response to the *Michael H.* decision, in August 1990 the California legislature amended former Cal. Evidence Code § 621(c), the precursor to Family Code § 7541(b), to enable a putative father like Michael, in addition to the husband or wife, to challenge the conclusive presumption through blood tests. *See* Miller, Baseline, *Bright-line, Best Interests: A Pragmatic Approach for California to Provide Certainty in Determining Parentage*, 34 McGeorge L.Rev. 637, 688 and n.323 (2003).

argument either, as that case demonstrates the primacy of biological connection, by holding that for the purposes of preventing adoption, there is no difference between a father and a mother. This Court held that a statute allowing mothers, but not fathers, to withhold consent to adoption, "both excludes some loving fathers from full participation in the decision whether their children will be adopted and, at the same time, enables some alienated mothers arbitrarily to cut off the paternal rights of fathers." As California's high court noted some years later in discussing *Caban*, *Lehr v. Robertson*,[9] *Michael H, supra,* and other decisions, "Although the foregoing court decisions do not provide a comprehensive rule for all situations involving unwed fathers, one unifying and transcendent theme emerges. *The biological connection between father and child is unique and worthy of constitutional protection if the father grasps the opportunity to develop that biological connection into a full and enduring relationship." Adoption of Kelsey S., supra,* 1 C.4th at 838 (emphasis supplied).

Kim tenaciously sought the chance to develop her biological connection to her child into an enduring relationship.

In conclusion, Petitioners have not established that stepmother Amy met a threshold requirement for an equal protection claim based on gender discrimination – that as a stepmother attempting to challenge a present, rights-asserting gestational/birth mother's maternity, she was

---

[9] In *Lehr v. Robertson*, 463 U.S. 248 (1983), this Court determined that because a putative father had never established a substantial relationship with his child, while the mother had continuous custodial responsibility for the child, the New York statute under which the putative father was not entitled to notice of the adoption proceedings unless he mailed a postcard to the putative father registry did not deny the putative father equal protection under the Fourteenth Amendment.

similarly situated to a stepfather attempting to assert paternal rights as against a biological father.[10] Thus, Petitioners' equal protection argument is meritless.

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

BARBAKOW & RIBET
CLAUDIA RIBET
ELIZABETH ANTHONY
301 North Canon Drive,
Suite 303
Beverly Hills, California 90210
(310) 860-9162
Counsel for Respondent

April 3, 2007

[10] Also, contrary to Petitioners' assertion (Petition, p. 4), the Court of Appeal decision does not conflict with this Court's decision in *Troxel v. Granville*, 530 U.S. 57 (2000). In *Troxel*, this Court held that since parents have a Fourteenth Amendment fundamental right to make decisions concerning the care, custody and control of their children, a Washington state law that, as applied, allowed trial courts to grant nonparent visitation rights over a parent's objection unconstitutionally infringes on that right. The decision does not instruct who may be considered a parent.

Cal. Fam. Code § 7610 (West). Methods of establishment

The parent and child relationship may be established as follows:

(a) Between a child and the natural mother, it may be established by proof of her having given birth to the child, or under this part.

(b) Between a child and the natural father, it may be established under this part.

(c) Between a child and an adoptive parent, it may be established by proof of adoption.

FILED
APR 16 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

(3)

No. 06-1190

In the Supreme Court of the United States

Amy G. and G. G.,
Petitioners,
v.
M. W.,
Respondent.

On Petition for a Writ of Certiorari to the California Court of Appeal Second District, Division Three

REPLY TO BRIEF IN OPPOSITION

Leslie Ellen Shear
Counsel of Record,
Admitted 1988
16830 Ventura Blvd., Suite 347
Encino, CA 91436-1749
(818) 501-3691

Robert J. Friedman
9454 Wilshire Blvd., Suite 500
Beverly Hills, CA 90212-2908
(310) 273-2959

Counsel for Petitioner, G. G.

Diane M. Goodman
Goodman & Metz
17043 Ventura Blvd.
Encino, CA 91316-4128
(818) 386-2889

Counsel for Petitioner, Amy G.

TABLE OF CONTENTS

I. No independent state grounds support California's gender-stereotyped double standard for conferring "parent" and "stepparent" legal status 1

II. Whether men and women are similarly-situated in parentage actions is a federal constitutional question, not an independent state ground; California can't avoid constitutional scrutiny by using gender stereotypes to label equality "impracticable." 3

III. Because biology doesn't determine paternity in many states, the gender-based double standard affects children and families across the nation; women have raised their husbands' children as their own since the days of Sarah, Abraham and Hagar 5

IV. California's double standard fails to serve stated purposes; cannot withstand constitutional scrutiny 7

TABLE OF AUTHORITIES

United States Constitution

Amendment XIV ..... *passim*

California Statutes

Family Code §7610 ..... 4, 5

Family Code §7550 et seq. 4

Family Code §7650 ..... 4, 5

Federal Cases

Lehr v. Robertson 463 U.S. 248, 265 (U.S. 1983) 3

Michael H. v. Gerald D., 491 U.S. 110 (U.S. 1989) 8

Troxel v. Granville, 530 U.S. 57 (U.S. 2000) 1

State Cases

Amy G. v. M.W., 142 Cal.App.4th 1 (Cal., 2006) ..... *passim*

In re Adoption of Arthur M., --- Cal.App.4th ---, 2007 WL 1056317 (Cal. 2007) 9

Craig L. v. Sandy S., 125 Cal.App.4th 36 (Cal., 2004) 4

Dawn D. v. Super. Ct. (Jerry K.) 17 Cal.4th 932 (Cal. 1998) 4, 9

In re Elijah V. 127 Cal.App.4th 576 (Cal.2005) 9

Elisa B. v. Superior Court, 37 Cal.4th 108 (Cal. 2005) 2

In re Jesusa V., 32 Cal.4th 588 (Cal. 2004). 2, 7

Johnson v. Calvert, 5 Cal.4th 8 (Cal. 1993) 4

Adoption of Kelsey S., 1 Cal.4th 816 (Cal. 1992) 9

Kusior v. Silver, 54 Cal.2d 603 (Cal.1960) 4

Adoption of Michael H., 10 Cal.4th 1043 (Cal.1995) . . 9

In re Salvador M., 111 Cal.App.4th 135 (Cal. 2003) 2

In re Sarah C., 8 Cal.App.4th 964, (Cal.1992) 9

I. No independent state grounds support California's gender-stereotyped double standard for conferring "parent" and "stepparent" legal status.

Amy G. and G.G.'s Petition asks whether California's use of gender-stereotypes to justify different standards for maternity and paternity cases can survive federal equal-protection, due-process, and family-privacy guarantees.

M.W.'s Opposition labels the California appellate court's unconstitutional construction of the state's parentage statutes "independent state grounds." There are no independent state grounds.

When state courts construe their laws using gender stereotypes to justify different legal standards for determining who has a constitutionally-protected legal status and who does not, those laws present a federal constitutional question.

State parentage laws determine who is a parent, who is a stepparent, and who is a nonparent. Parents have constitutionally protected rights to the care and custody of their children. Stepparents and nonparents do not have those constitutionally-protected rights. *Troxel v. Granville*, 530 U.S. 57 (U.S. 2000) Consequently, all state laws governing who enjoys the federal constitutionally-protected status of parenthood are subject to rigorous federal constitutional scrutiny.

California uses different rules to decide whether a man is a child's father or a child's stepfather than it uses to decide whether a woman is a child's mother or a child's stepmother. If California applied the same legal standard to M.W. and Amy G. that it applies in paternity cases, Amy G. would be recognized in law as the child's mother. M.W. conceived a child with a married man, never supported the child, and failed to fully commit to all of the responsibilities of parenthood at the earliest opportunity. Amy G. is married to the child's father, is the mother of

the child's siblings, supports the child, and has the strongest psychological bond with him.

California's "... paternity presumptions are driven, not by biological paternity, but by the state's interest in the welfare of the child and the integrity of the family." *In re Jesusa V.* 32 Cal.4th 588, 615 (Cal. 2004); *Elisa B. v. Super. Ct. (Emily B.)* 37 Cal.4th 108, 121 (Cal. 2005), both California opinions quoting the California Court of Appeal opinion in *In re Salvador M.* 111 Cal.App.4th 1353, 1357-1358 (Cal. 2003).

Substitution of gender-stereotypes for individualized determinations produced an outcome that defeats, rather than serves, the statutory scheme's purposes. In this fact-pattern and others, California gives biological mothers full parental rights when their conduct is identical to that of biological fathers who have no parental rights under California law.

The court of appeal decision contains no "stand-alone," constitutional state grounds. California's parentage double standard is founded upon gender stereotypes. The appellate court concluded that gestation and childbirth create the strongest psychological bonds, and the greatest commitment to motherhood. By contrast, California law looks skeptically at biological fathers, consistently holding them to far higher standards to demonstrate commitment to fatherhood and psychological bonds with the child.

M.W.'s Opposition avoids comparing the way California law treats paternity with the way California law treats maternity. M.W. never addresses the pervasive, gender-based double standards of California parentage law.

But for California's presumed-father laws, men that California recognizes as fathers would be only stepfathers. The federal constitution requires that California apply the same criteria when deciding who the law treats as a mother and who the law treats as a stepmother.

Because California law substitutes sex-based stereotypes about birth mothers' innate commitment to

mothering for the individualized determinations it uses to compare the conduct of competing putative fathers, California law violates the equal-protection, due-process and family-privacy guarantees of the federal constitution.

II. Whether men and women are similarly-situated in parentage actions is a federal constitutional question, not an independent state ground; California can't avoid constitutional scrutiny by using gender stereotypes to label equality "impracticable."

There is no *nexus* between the purpose of the parentage statutes (family integrity and children's welfare) and parental. Hence mothers and fathers must be recognized under the same set of rules -- they are similarly-situated for the purposes of defining who holds the legal status of parent. Men and women have equal rights to raise children. Men and women have equal duties to pay support.

A state may not subject men and women to disparate treatment when there is no substantial relation between the disparity and an important state purpose. *Lehr v. Robertson* 463 U.S. 248, 265 (U.S.1983) California's differential treatment of men and women produces results that defeat the purposes of the statutory scheme – protection of family integrity and children's established relationships.

If recognition of M.W. as the mother here served those purposes, M.W. would not need to rely on a double standard. Although M.W. fails to compare the way parentage law treats motherhood with the way it treats fatherhood, that difference is what makes the law unconstitutional. M.W. could not meet the standards that the law requires of biological fathers.

Even when a biological father demonstrates a full commitment to parenthood at the stage of the child's life

when M.W. chose the opposite course, California law can either deny him standing *(Dawn D. v. Super. Ct. (Jerry K.)* 17 Cal.4th 932 (Cal. 1998)), or compare and contrast him to the mother's husband *(Craig L. v. Sandy S.*, 125 Cal. App.4th 36 (Cal. 2004)).

M.W. correctly notes that one way of establishing maternity under California law is by proof of giving birth. Cal. Fam. Code §7610. California law also permits evidence of biological fatherhood to establish paternity. Cal. Fam. Code §7550 *et seq.* M.W. argues that because only women can give birth, application of the statute to bar Amy's claim survives equal-protection scrutiny.

She misses the point. The issue before this Court is not application of the statutory gender-neutral mandate of Cal. Fam. Code §7650. The issue here is whether application of that statute to trump the parentage presumptions or facilitate adoption by nonparents is narrowly tailored to serve the underlying purposes of the state's parentage laws.

Neither statute permitting biological evidence to establish parentage mandates a finding that the biological parent must be recognized as the legal parent. For example, California's Supreme Court refused to apply §7610 to establish the maternity of a gestational surrogate who had given birth, over the claims of the father and his wife who had retained the services of the surrogate. *Johnson v. Calvert*, 5 Cal.4th 8 (Cal. 1993) Similarly, California's presumed-father cases have long been held to trump its blood-test act. *Kusior v. Silver*, 54 Cal.2d 603 (Cal.1960)

California law may use gender-based methods to identify biological parents. Men and women differ biologically. Once the child is born, those biological differences are no longer legally cognizable, where the policy of the law is family integrity and child welfare. When conferring parental rights, the state may not prefer biological mothers over presumed mothers, unless it also prefers biological fathers over presumed fathers.

By construing §7610 as dispositive of maternity, the *Amy G.* opinion establishes unconstitutional, gender-based discrimination. California may not legislate a birth-mother exception to its otherwise gender-neutral (Cal. Fam. Code §7650) presumed-father laws. No matter what the rationale, California must either base parentage strictly on biology, or subject men and women to the same case-by-case weighing process.

The federal constitution does not permit a state to justify differential treatment of men and women when deciding who is a parent and who is a stepparent just by labeling equality "impracticable." This Court should compare the legal standards governing men with those governing women in parentage cases and decide whether gender differences are sufficiently tied to the state's purposes. M.W.'s Opposition avoids looking at the policies that animate the parentage statutes, because those policies point to equal treatment of men and women.

III. Because biology doesn't determine paternity in many states, the gender-based double standard affects children and families across the nation; women have raised their husband's children as their own since the days of Sarah, Abraham and Hagar.

M.W. tries to limit the scope of the issues in this case to the particulars of California law. But California's statutory scheme is not unique – gender discrimination is pervasive in parentage and custody cases. This Court should decide whether states must view motherhood and fatherhood through identical legal lenses.

California, like many other states, has adopted a variant of the Uniform Parentage Act. Many UPA states confer parental status on biologically-unrelated men, despite the claims of a biological father, as California's Supreme Court notes,

Moreover, other states that have adopted the UPA have consistently declined to make biology determinative under their analogs to section 7612 when confronted by competing presumptions of paternity. In *N.A.H. v. S.L.S.* (Colo. 2000) 9 P.3d 354, for example, the Colorado Supreme Court found that "neither the presumption of legitimacy nor the presumption based on biology is conclusive" (id. at p. 362) and held instead "that when presumptions of paternity arise in more than one potential father, trial courts must take the best interests of the child into account as part of policy and logic in resolving competing presumptions." (Id. at p. 366.) In *Doe v. Doe*, *supra*, 52 P.3d 255, the Hawai'i Supreme Court similarly found that "the genetic testing presumption is not more important than the other presumptions; it is one of several that must be considered . . . ." (Id. at p. 262.) In *Witso v. Overby* (Minn. 2001) 627 N.W.2d 63, the Minnesota Supreme Court declared that even if genetic tests identified one man as the biological father, the court must nonetheless "weigh the conflicting presumptions, and 'the presumption which on the facts is founded on the weightier considerations of policy and logic controls.'" (Id. at p. 69; *Matter of Welfare of C.M.G.* (Minn.Ct.App. 1994) 516 N.W. 2d 555, 560 ["Where competing presumptions of paternity exists, the determination of paternity is no longer solely an issue of biological fact"].) And, in *Love v. Love* (1998) 114 Nev. 572 [959 P.2d 523, 527], where only the husband's presumption was at issue and he sought to disclaim paternity on the ground he was not the biological father, the Nevada Supreme Court observed that "where factors conflict, as they may here, the district court must use its discretion to apply considerations of policy and logic to the relevant evidence." In short, our construction – which permits a court to consider every relevant

consideration of policy and logic – is in accord with every UPA state to have addressed the issue. [Fn]

In re Jesusa V., supra, 32 Cal.4th at 608

Every state that permits recognition of biologically-unrelated men as fathers must face the question of whether the same legal standards govern when biologically-unrelated women claim parentage.

The facts of this case are far from unique. Women have raised their husbands' extramarital children as their own since the time of the Old Testament. According to Genesis, Sarah and Abraham raised Ishmael (Abraham's extramarital son born to Sarah's maid, Hagar) with their son Isaac. Both boys grew up as children of Abraham's marriage to Sarah.

The decision here can only stand if a state's use of gender stereotypes to justify different treatment of men and women in parentage cases meets federal constitutional standards. If it does not, there can be no independent state grounds – the grounds set forth in the decision apply the parentage statutes differently based solely on gender.

IV. California's double standard fails to serve stated purposes; cannot withstand constitutional scrutiny.

In arguing that this Court should deny the Petition, M.W. focuses on the California cases involving motherhood. That focus sends the Court after a MacGuffin – the real flaws in the link between biological determinism and social policy show up when one compares how California applies the presumed-father laws in paternity cases to the way it handles maternity cases. M.W. avoids that comparison, and fails to show that there is a sufficient link between gender and the purpose of the statutes.

California assumes that pregnancy makes women committed mothers, while testing each putative father's

commitment to parenthood through close examination of his course of conduct with respect to the child and its mother. Thus California substitutes stereotypes about the psychological bonds arising from pregnancy and childbirth for individualized determinations in parentage cases – favoring birth mothers who fail to *fully* assume parental responsibilities at the earliest opportunity, while applying a dramatically different standard in paternity cases.

Application of those stereotypes defeats the purposes of the statutory scheme in this case and in other recurring fact patterns. The result here does not protect the child's established family relationships, give him the protection of the marital family, or protect him from the stigma of illegitimacy. If the Court had applied the legal standard it uses to distinguish between fathers and stepfathers, that standard would have served all three legislative policies.

The task at hand entails comparing how California treats women with how it treats men. That means looking hard at conduct, rather than reaching for shocking language to characterize the outcome, or paint M.W. as a passive victim.

For example, M.W. argues that recognizing Amy as the mother, is tantamount to making M.W. an involuntary surrogate. That argument has two flaws. First, one could equally argue that recognizing Gerald D. as the father in *Michael H. v. Gerald D.*, 491 U.S. 110 (U.S. 1989) made Michael H., who developed a psychological father-daughter relationship with Victoria, Gerald's sperm donor. Second, M.W. knowingly conceived a child with a married man. M.W. knowingly turned that child over to his father and his father's wife to raise, and later changed her mind. M.W.'s choices and conduct contributed to the situation that enables Amy to assert presumed-mother status.

California appellate decisions in paternity cases illustrate the disconnect between California's gender-discriminatory application of the presumed-father statutes and the purposes of the statutory scheme.

California's appellate courts have held that a biological father's presumed-father status depends on promptness and the extent of his "full" commitment to assuming parental responsibilities.

Biological fathers (even though they cannot know whether the child is their genetic offspring until after birth) must come forward as soon as they learn of the mother's pregnancy, and assume full parental responsibilities. *Adoption of Kelsey S.*, 1 Cal.4th 816 (Cal. 1992); *Adoption of Michael H.*, 10 Cal.4th 1043 (Cal.1995) Even men who do everything they can when they learn of the pregnancy, can be barred from challenging a maritally-presumed father under *Dawn D. v. Super. Ct. (Jerry K.), supra,* 17 Cal.4th 932.

Application of those holdings in *In re Elijah V.* 127 Cal.App.4th 576 (Cal.2005) resulted in recognition of the mother's husband, not the biological father, as the child's legal father, where the biological father's actual course of conduct closely paralleled M.W.'s course of conduct. Similarly, a biological father whose childrearing involvement and commitment was greater than M.W.'s could not attain legal-father status in *In re Sarah C.*, 8 Cal.App.4th 964, (Cal.1992).

The pervasive gender bias in California parentage law also arises in the context of consent to adoption. Last week California's Court of Appeal decided *In re Adoption of Arthur M.*, --- Cal.App.4th ---, 2007 WL 1056317 (Cal. 2007), a case involving unmarried high school students who conceived a child. The recognized the parental rights of the mother, although she spent the pregnancy making arrangements to divest herself of parental responsibilities by consenting to the maternal grandparents' independent adoption.

The Court held that the biological father did not have parental rights because he initially reacted to news of the pregnancy by "demanding" that the mother terminate the pregnancy, and failed to provide emotional and economic

support to her during the pregnancy. Although the father, despite uncertainty about his biological paternity, rose to the occasion before his son was born, brought a parentage action, and sought custody within two days after he learned of the birth, he did not win parental rights.

Clearly this allocation of parental rights cannot be supported by the notion that birth mothers are more committed to parental responsibilities and more bonded to their children than biological fathers.

California law makes biology determinative of paternity only in limited circumstances – when there is no competing presumed father. In other words, California law subordinates biological fatherhood to social fatherhood. By contrast, California ignores social motherhood when it occurs in the marital family. Since there is no gender-related difference between the child-rearing roles of mothers and fathers, and no difference between the economic support roles of mothers and father, gender cannot support this distinction.

There is no substantial link between the purposes of California's parentage statutes, as articulated by California's Supreme Court and appellate courts, and parental gender. Distinctions based on gender stereotypes produce results that undermine the purposes of the statutes, and preclude courts from acting in children's best interests. So long as California substitutes romantic stereotypes about maternity for case by case determinations, and fails to apply the same standards to men and women in parentage cases, California will deprive parents and children of the equal-protection, due-process and family-privacy protections of the federal constitution.